

~~1460~~ United States 1454  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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CHUN NGIT NGAN,

Plaintiff in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the Supreme Court of the  
Court of the Territory of Hawaii.

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**FILED**

OCT 10 1925

F. D. MONCKTON,  
CLERK



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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Plaintiff in Error,

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Upon Writ of Error to the Supreme Court of the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant.

### AMENDED COMPLAINT.

To the Honorable the Judge Presiding in the Above-  
entitled Matter:

Plaintiff above named, complaining of defendant  
above named, and for cause of action, alleges:

#### I.

That plaintiff above named, Chun Ngit Ngan, is  
the widow of Yuen Tai Kam, who died in Honolulu,  
Territory of Hawaii, intestate on the 5th day of  
February, A. D. 1923.

#### II.

That the Prudential Insurance Company of  
America is a New Jersey corporation doing a life  
insurance business in the Territory of Hawaii  
through the Hawaiian Trust Company, Limited, an  
Hawaiian corporation, who is its duly constituted  
and acting agent.



## III.

That on the 1st day of May, A. D. 1922, decedent entered into a certain contract of insurance with defendant wherein and whereby in consideration of certain stated payments to it to be paid by the said Yuen Tai Kam, it agreed to pay to the said plaintiff, herein, upon the death of the said Yuen Tai Kam, in event that the said Yuen Tai Kam should die within [1\*] twenty years from the date of the issuance of said policy of insurance the sum of five thousand dollars (\$5,000.00), a copy of said contract being hereto attached marked Exhibit "A," and made a part hereof; that said Yuen Tai Kam died within one year of the date of the issuance of said policy of insurance.

## IV.

That notwithstanding that the said Yuen Tai Kam died in Honolulu, Territory of Hawaii, on the 5th day of February, A. D. 1923, and notwithstanding that the said Yuen Tai Kam had paid all sums due under said policy of insurance issued to him as aforesaid, the defendant has failed, refused and neglected to pay the said plaintiff the sum of \$5,000 as it had promised and agreed to do as herein set forth.

## V.

That said plaintiff has complied with all the conditions and provisions in said policy of insurance contained and has submitted to said defendant in

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\*Page-number appearing at foot of page of original certified Transcript of Record.



the manner and form required by it due proof of the death of said Yuen Tai Kam.

WHEREFORE plaintiff prays judgment against the defendant in the sum of \$5,000.00, together with costs, interest and attorneys' commissions and prays that process issue out of this court summoning defendant to appear and answer this complaint at the time and place in said summons set forth.

Dated at Honolulu, T. H., this 8th day of November, A. D. 1923.

CHUN NGIT NGAN,  
Plaintiff Above Named.

By THOMPSON, CATHCART & ULRICH,  
E. H. BEEBE,  
Her Attorneys. [2]

City and County of Honolulu,  
Territory of Hawaii,—ss.

George Inn, being first duly sworn, deposes and says: That he is an attorney-in-fact for Chun Ngit Ngan, and makes this affidavit as such attorney in behalf of the said Chun Ngit Ngan; that he has read over the foregoing amended complaint and knows the contents thereof and that the same is true and correct.

GEORGE INN.

Subscribed and sworn to before me this 8th day of November, A. D. 1923.

[Seal] C. S. YUEN,  
Notary Public, First Judicial Circuit, Territory of  
Hawaii.

Due service, by copy of the within amended complaint is hereby admitted.

FREAR, PROSSER, ANDERSON &  
MARX,

MFP.,  
Attorneys for Defendant.

Honolulu, Hawaii, November 9th, 1923.

[Endorsed]: Filed Nov. 9, 1923, at 25 minutes  
past 10 o'clock A. M. [3]

# THE PRUDENTIAL



## INSURANCE COMPANY OF AMERICA

IN CONSIDERATION of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amounts named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

THE INSURED YUEN TAI KAM  
FACE AMOUNT OF INSURANCE --- FIVE THOUSAND --- Dollars,  
payable at the Home Office of the Company, in Newark, New Jersey, twenty years after the date hereof, on the first day of May, 19 42, provided the Insured be then living and this Policy be then in force; or immediately upon receipt of due proof of the prior death of the Insured while this Policy is in force.

PAYABLE TO the Insured, if living twenty years after the date hereof, or, in case of the prior death of the Insured, to CHUI NGIT NGAN, Beneficiary, wife of the Insured.

ACCIDENTAL DEATH BENEFIT --- FIVE THOUSAND --- Dollars,  
payable to the Beneficiary in addition to the Face Amount of Insurance, in event of death by accident as defined in the clause headed "Provisions as to Accidental Death Benefit," on the second page hereof, subject to the provisions therein set forth.

If there be no Beneficiary living at the death of the Insured the amount of insurance payable shall be paid to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has --- been reserved by the Insured.

### TOTAL AND PERMANENT DISABILITY BENEFITS.

MONTHLY INCOME TEN DOLLARS PER MONTH FOR EACH \$1000 of the Face Amount of Insurance, payable to the Insured in event of total and permanent disability before age 60, subject to the provisions as to Total and Permanent Disability contained in the Policy.

WAIVER OF PREMIUMS in event of Total and Permanent Disability as hereinafter provided.

Annual PREMIUM --- Two hundred Thirty-three and 95/100 --- Dollars,

payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the following due dates, the first day of May

in every year during the continuance of this Policy, until twenty full years' premiums shall have been paid, or until the prior death of the Insured.

IN WITNESS WHEREOF, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this first day of May, one thousand nine hundred and twenty-two



*Horace A. Snyder.*  
President.

ATTY.

*[Signature]*

*William J. Hamilton*  
Secretary

Age 28

Twenty-Year Endowment Policy—Annual Dividends. Premiums Payable for Twenty Years. Accidental Death Benefit. Total and Permanent Disability Provision: Monthly Installments Without Deduction from Insurance, Waiver of Premiums.

100 12215-40

FOUNDED BY JOHN F. DRYDEN  
PIONEER OF INDUSTRIAL INSURANCE IN AMERICA

Exhibit "A"









11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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MEDICAL EXAMINER'S CONFIDENTIAL REPORT

**Cash Surrender Values Under Paid-up Endowment and Paid-up Term Policies.**—If this Policy shall lapse, as above, and a Paid-up Endowment Policy be issued or a Paid-up Term Policy be put in force in lieu thereof, such Paid-up Endowment or such Paid-up Term Policy may be surrendered at any time for its full reserve value at the time of such surrender. The Company reserves the right to defer the payment of any cash surrender value for a period not exceeding ninety days after application for such cash surrender value.

**TABLE OF LOAN AND NON-FORFEITURE VALUES.**  
(Values subject to reduction on account of any outstanding indebtedness as heretofore provided.)

12-26

The Cash Surrender and Loan Values, Paid-up Endowment Policies and Pure Endowment stated in the following table apply to a policy of \$1000, Face Amount of Insurance. As the Face Amount of Insurance under this Policy is \$5000, the Cash Surrender and Loan Value (column 1), the Paid-up Endowment Policy (column 2) or the Pure Endowment (column 3) available in any year will be **five times** the amount stated in the table below for that year.

(1) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(2) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(3) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance	(4) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(5) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(6) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance
1 Year	None	None	11 Years	\$428 00	\$575 00
2 Years	\$50 00	\$88 00	12 "	482 00	628 00
3 "	82 00	140 00	13 "	540 00	681 00
4 "	118 00	197 00	14 "	601 00	734 00
5 "	160 00	258 00	15 "	665 00	787 00
6 "	198 00	311 00	16 "	726 00	832 00
7 "	239 00	363 00	17 "	790 00	875 00
8 "	282 00	416 00	18 "	857 00	918 00
9 "	328 00	469 00	19 "	927 00	959 00
10 "	376 00	522 00	20 "	1000 00	Policy Payable

\*The tabular loan value at the end of any year, discounted at the rate of six per cent. per annum, shall be available to the Insured at any time after the entire premium for that year has been paid.

The non-forfeiture values in the above table are based upon the American Experience Table of Mortality with three and one-half per cent. interest per annum, and the net value of any such non-forfeiture value, from the second to the end of the fifteenth year, is at least equal to the entire reserve on this Policy, according to the foregoing standard, less a percentage (not more than two and one-half of the Face Amount of Insurance under the Policy; thereafter, such net value is the full reserve by said standard, less a surrender charge, if made, not more than one-twentieth of one per cent. of the Face Amount of Insurance under the Policy.

If the Face Amount of Insurance be increased by dividend additions the Loan and Cash Surrender Values will be increased by the full reserve on account of such additions and the other non-forfeiture values modified accordingly. If the premiums of this Policy be paid in quarterly or semi-annual installments, due allowance will be made in computing values from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated; provided, however, that if more than one but less than two full years' premiums shall have been paid an allowance of fifteen days of continued insurance will be made for each quarter of a year for which the premium has been paid.

### PROVISIONS AS TO MODES OF SETTLEMENT AT MATURITY.

The Insured may at any time while this Policy is in force, subject to the rights of any assignee and with the power of revocation, by written notice to the Company, designate any one of the following options as the manner in which the amount of insurance shall be payable in lieu of being paid in one sum, and the Company will then endorse on the Policy that payment shall be made according to the option designated, but if the Insured shall have made no such designation, the Beneficiary shall have the right of designation; provided, however, that in no event shall Option 1 or 2 be available to an individual Beneficiary if the amount of each installment payable thereunder to such Beneficiary would be less than \$10, nor shall Option 3 be available if the amount of insurance payable be less than \$1,000 and none of said options shall be available if the Beneficiary be a corporation or a firm. If this Policy mature as an Endowment and be payable to the Insured, and if the Insured shall designate one of the following options as the mode of settlement, the provisions of such option shall be construed as applying to the Insured in the same manner as they would have applied to the Beneficiary if the Policy had matured by death.

**Option 1. Monthly Installments for Definite Number of Years.**—The amount of insurance on a part thereof to be payable in equal monthly installments, each installment of the amount stated for the definite number of years selected, together with dividends, if any, according to the following table:

Number of Years During Which Monthly Installments Are Paid	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of Monthly Installment Per \$1,000 of Insurance	\$42.65	\$28.90	\$22.83	\$17.85	\$15.20	\$13.22	\$11.78	\$10.64	\$9.74	\$9.00	\$8.39	\$7.87	\$7.42	\$7.03	\$6.69	\$6.40	\$6.11	\$5.91	\$5.70	\$5.51	\$5.34	\$5.18	\$5.01	\$4.92

**Option 2. Monthly Installments for Definite Number of Years and Continuously Thereafter.**—The amount of insurance on a part thereof to be payable in equal monthly installments, each installment of the amount stated for the age of the Beneficiary at the death of the Insured, together with dividends, if any, and payable during the definite number of years selected, and thereafter so long as the Beneficiary shall live, as specified in the following table:

Amount of Monthly Installment Per \$1,000 of Insurance, Payable During Years Stated and Thereafter During Lifetime of the Beneficiary	Definite Number of Years	Age of Beneficiary When Policy Becomes a Claim																							
		16 and under	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39
	5 Years	\$3.91	\$3.94	\$3.96	\$3.98	\$4.00	\$4.03	\$4.06	\$4.11	\$4.14	\$4.18	\$4.21	\$4.25	\$4.28	\$4.32	\$4.36	\$4.41	\$4.45	\$4.50	\$4.55	\$4.61	\$4.67	\$4.73	\$4.79	\$4.85
	10 Years	\$3.87	\$3.89	\$3.91	\$3.93	\$3.95	\$3.98	\$4.00	\$4.03	\$4.06	\$4.09	\$4.12	\$4.15	\$4.19	\$4.22	\$4.26	\$4.30	\$4.34	\$4.38	\$4.43	\$4.48	\$4.53	\$4.59	\$4.64	\$4.70
	15 Years	\$3.81	\$3.83	\$3.85	\$3.87	\$3.89	\$3.91	\$3.94	\$3.96	\$3.99	\$4.02	\$4.05	\$4.08	\$4.11	\$4.14	\$4.18	\$4.21	\$4.25	\$4.29	\$4.34	\$4.38	\$4.43	\$4.48	\$4.53	\$4.59
	20 Years	\$3.74	\$3.76	\$3.78	\$3.80	\$3.82	\$3.84	\$3.86	\$3.89	\$3.91	\$3.94	\$3.97	\$3.99	\$4.02	\$4.05	\$4.09	\$4.12	\$4.15	\$4.19	\$4.23	\$4.27	\$4.31	\$4.35	\$4.40	\$4.44

**Option 3. Trust Fund.**—The amount of insurance or any portion thereof not less than \$1,000 to be left during the lifetime of the Beneficiary in trust with the Company, and the Company will pay thereon, so long as the said amount or said portion thereof remains with the Company, interest at the rate of three and one-half per cent. per annum, together with dividends, if any. The said Trust Fund shall be paid at the death of the Beneficiary to the executors or administrators of the Beneficiary.

**Annual, Semi-Annual or Quarterly Installments.** computed at the rate of three and one-half per cent. per annum compound interest, will be paid upon request in lieu of the monthly installments provided under Options 1 and 2, unless the Insured shall have otherwise directed in writing.

**Unpaid Installments at Death of Beneficiary.**—If one or more installments shall not be paid in accordance with the provisions above and if the Beneficiary shall die before all installments payable shall have been paid, and if there be no contingent beneficiary designated by the Insured or by the Beneficiary after the death of the Insured, the unpaid installments will be computed at the rate of three and one-half per cent. per annum compound interest and paid in one sum to the executors or administrators of the Beneficiary.

**Dividends with Installments or Interest.**—If the amount of insurance be payable in installments, monthly or otherwise, or be left in trust with the Company, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will affect an increase in the installments or in the interest payable on account of the trust fund, but no dividend will be declared on installments payable after the period fixed for installments certain.

12215-40





[Title of Court and Cause.]

AMENDED ANSWER TO PLAINTIFF'S  
AMENDED COMPLAINT.

Now comes the defendant above named by its attorneys, Frear, Prosser, Anderson & Marx, and for answer to the amended complaint heretofore filed herein shows unto this Honorable Court as follows:

I.

Defendant denies the truth of each and every allegation in said complaint contained.

II.

The defendant hereby gives notice to the plaintiff that it intends to rely, among other things, upon the defenses of misrepresentation and fraud by the insured in connection with the procurement of the policy upon which this action is based.

WHEREFORE, defendant prays judgment that said complaint be dismissed with costs to said defendant.

Dated, Honolulu, T. H., January 3, 1924.

THE PRUDENTIAL INSURANCE COM-  
PANY OF AMERICA.

By FREAR, PROSSER, ANDERSON &  
MARX,

MFP.,  
Its Attorneys.

Due service of the foregoing amended answer is admitted this 3d day of Jan'y, 24.

THOMPSON, CATHCART & BEEBE,  
Per E. H. B.

[Endorsed]: Filed Jan. 3, 1924, at 2:30 P. M.  
[8]

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[Title of Court and Cause.]

### DECISION.

This is a suit on an insurance policy issued by the Prudential Insurance Company of America on the 1st day of May, 1922.

The name of the insured was Yuen Tai Kam and the beneficiary is Chun Ngit Nhan, designated in the policy as the wife of the insured.

The amount of the insurance is \$5,000.00. It was admitted at the trial that the insured died on Feb. 5th, 1923; that at the time of his death, all premiums due under the policy of insurance had been paid; that the plaintiff is the beneficiary named in the policy, and that she was the wife of the insured; that due notice of the death of the insured was furnished the defendant under the provisions of the policy; that no court proceedings were taken by the defendant to contest its liability under the policy within one year subsequent to its issuance.

Evidence was introduced by the defendant tending to show that at the time the insured made application for insurance, he made to the examining physician certain false and fraudulent [9] state-

ments concerning his physical condition and the state of his health, and I am of the opinion from this evidence that the insured thus practiced a fraud on the defendant and that if the insured had truthfully stated to the examining physician his physical condition, the defendant would not have issued the policy. The policy of insurance contains the following provision: "This policy shall be incontestable after one year from its date, except for nonpayment of premium, but if the age of the insured be misstated the amount or amounts payable under this policy shall be such as the premium would have purchased at the correct age."

Before the expiration of one year from the date of the policy, and subsequent to the death of the insured, the defendant, thru its agents, called on the beneficiary at her home in Honolulu and tendered to her the full amount of the premiums that had been paid on the policy and demanded its return. The beneficiary declined to accept the premiums tendered to her and declined to surrender the policy.

It is the contention of the defendant that because of the fraud practiced on it by the insured, the policy of insurance was void and that in thus tendering to the beneficiary the premiums that had been paid and demanding a return of the policy, the defendant contested the policy as it had a right to do.

The plaintiff on the other hand contends that the defendant could only have contested the policy, on the ground of fraud, by instituting, within one year from its date, some appropriate legal proceed-

ing challenging its validity and that merely tendering to the beneficiary the premiums that had been paid and demanding a return of the policy were not a contest within the meaning of the law. [10]

The weight of both reason and judicial authority in my opinion support the plaintiff's contention. The defendant having failed to contest the policy of insurance within one year after its date by instituting suit for that purpose is now estopped from questioning its validity. Judgment will therefore be entered for the plaintiff against the defendant in the sum of \$5,000.00 together with 8% interest on that amount.

[Court Seal]

JAS. J. BANKS,  
Third Judge.

[Endorsed]: Filed at 10:35 o'clock A. M., May 10, 1924. [11]

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

L.—No. 10307.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant.

### JUDGMENT.

Pursuant to the decision duly rendered and filed  
herein,—

IT IS THE ORDER AND JUDGMENT OF  
THIS COURT, that the plaintiff, Chun Ngit Ngan,  
do have and recover of the defendant, The Prudential  
Insurance Company of America, the sum of Five  
Thousand Five Hundred Three and 33/100 Dollars  
(\$5,503.33), together with costs taxed at \$171.33.

Dated, Honolulu, T. H., this 12th day of May,  
A. D. 1924.

[Court Seal]

JAS. J. BANKS,

Third Judge of the Circuit Court, First Judicial  
Circuit, Territory of Hawaii.

O. K.—FREAR, PROSSER, ANDERSON &  
MARX.

P.

[Endorsed]: Filed at 3 o'clock P. M., May 12,  
1924. [12]

[Title of Court and Cause.]

EXCEPTION TO DECISION AND JUDGMENT.

Now comes the defendant above named by Frear, Prosser, Anderson & Marx, its attorneys, and hereby excepts to the decision heretofore rendered and filed in the above-entitled cause on the 10th day of May, 1924, and further excepts to the judgment entered in the above-entitled cause in favor of the plaintiff and against the defendant filed herein on the 12th day of May, 1924, on the ground that said decision and judgment are contrary to law, contrary to the evidence and contrary to the weight of evidence in said cause.

Dated, Honolulu, May 13, 1924.

FREAR, PROSSER, ANDERSON &  
MARX.

M. F. P.,

Attorneys for Defendant.

The foregoing exception is hereby allowed.

Dated, Honolulu, May 13, 1924.

[Seal]

JAS. J. BANKS,

Circuit Judge, First Judicial Circuit, Territory of  
Hawaii.

[Endorsed]: Filed May 13, 1924, at 3:30 P. M.

[13]

[Title of Court and Cause.]

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JAMES L. HORNER,  
Reporter.

Filed at 11:40 o'clock A. M., June 23, 1924. Sibyl Davis, Clerk.

No. 1556. Rec'd and filed in the Supreme Court June 23, 1924, at 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk.

No. 1612. Filed in the Supreme Court, Apr. 14, 1925, at 3:25 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [14]

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[Title of Court and Cause.]

# TRANSCRIPT OF TESTIMONY.

May 2, 1924.

(The Clerk calls the case.)

Mr. PROSSER.—Ready for the defendant.

The COURT.—What says the plaintiff?

Mr. BEEBE.—We represent the plaintiff, if your



Honor please. This is an action on a life insurance policy.

The COURT.—Are you ready?

Mr. BEEBE.—Yes, if your Honor please.

The COURT.—Now, what is the suit about?

Mr. BEEBE.—The action, if your Honor please, is one by Chun Ngit Ngan, a Chinese woman and a beneficiary in a life insurance policy issued by the Prudential Life Insurance Company of New Jersey. The complaint, which is short and I will read to your Honor, sets forth. (Reads.) [15—1] To this complaint the defendant filed an answer, or an amended answer, as it is termed, denying the truth of every allegation in said complaint contained and giving notice to the plaintiff that they intended to rely, among other things, upon the defense of misrepresentation and fraud by the insured in connection with the procurement of the policy upon which this action is based.

The COURT.—The issuance of the policy is not denied, is it?

Mr. PROSSER.—No, sir.

The COURT.—Is it denied that the premiums were paid?

Mr. PROSSER.—No, sir.

The COURT.—Is it denied that the insured is dead?

Mr. PROSSER.—No, sir.

The COURT.—That is not denied.

Mr. PROSSER.—The only issue in the whole case, if your Honor please, is whether there was a legal contest within the so-called contestable period



of one year. That's the only issue in the case; that is, beside the issue of fraud; of course we contend that, because of fraudulent misrepresentation made by the insured at the time he applied for the policy, the policy was absolutely void, and the proper notice of rescission and tender back of the premiums was made by the company prior to the expiration of a year.

The COURT.—Yes. I assume then—may I assume that the [16—2] plaintiff—that you concede the plaintiff's *prima facie* case?

Mr. PROSSER.—We admit the making of the application, the examination of the insured by the company's surgeon, the issuance of the policy on May 1st, 1922, the payment of premiums by the insured, and his death on the 5th day of February, 1923, and that the plaintiff in this action is the party named in the policy as beneficiary thereunder.

The COURT.—Notice of death?

Mr. PROSSER.—And that notice of claim was filed with the company.

The COURT.—All right, then, I would think that that would make out the plaintiff's—

Mr. BEEBE.—Do you also admit that no action was instituted by the Prudential Life Insurance Company for the purpose of contesting or annulling this policy?

Mr. PROSSER.—We admit on behalf of the defendant that no legal action, that is, no court action, was taken by the defendant during the period of one year after the date of the policy for the pur-

pose of rescinding the policy or otherwise.

The COURT.—I would think, Mr. Beebe, that made out your *prima facie* case?

Mr. BEEBE.—Yes, if your Honor please, if I may be permitted, then, to introduce in evidence the policy—

Mr. PROSSER.—One minute. If your Honor please, there [17—3] is going to be considerable discussion, probably, on questions of law here, and I have some documentary evidence to introduce also, and also the evidence of a tender. We have the testimony of about five doctors in this particular case, and I would ask that they be permitted to go until, say, to-morrow. I don't like to keep those gentlemen here.

The COURT.—All witnesses in this case will return on Monday afternoon at two o'clock.

(Recess.)

Mr. BEEBE.—If your Honor please, Mr. Prosser just advised me that he is willing to admit that Chun Ngit Ngan, the plaintiff here, is the wife of the decedent Yuen Tai Kam.

Mr. PROSSER.—That's correct; we'll admit that. You want to offer the policy?

Mr. BEEBE.—I will then offer the policy in evidence.

Mr. PROSSER.—No objection.

The COURT.—It may be received.

Mr. BEEBE.—Does your Honor wish me to read the policy?

The COURT.—No, not now.

Mr. BEEBE.—That is the plaintiff's case, then, if your Honor please.

The COURT.—Now, I understand, Mr. Prosser, from your statement that your defense is that the policy was procured by the misrepresentation—  
[18—4]

Mr. PROSSER.—Briefly, our defense is this: That at the time the insured applied for the policy he was examined by the company's physician and, in reply to questions asked him by the company's physician, made certain material statements, which material statements were untrue, knowingly, and were material, and if those statements had been answered correctly, why the company never would have issued the policy. That within the period of one year the company ascertained the falsity of these statements and shortly after the death of the insured notified the beneficiary under the policy, the plaintiff in this case here, that the company would refuse to pay the policy because of fraud of the insured in the matter of his application, answering questions, etc., tendered back to the beneficiary, the plaintiff in this action, the entire amount of the premiums paid, demanded a return of the policy, and the plaintiff in this case refused to accept the return of the premiums and refused to deliver the policy.

The COURT.—Does the policy—In its terms does the policy become incontestable—?

Mr. PROSSER.—After the period of a year.

The COURT.—After the period of a year.

Mr. PROSSER.—And this rescission and tender

was made within a year.

The COURT.—Mr. Beebe, I understand from counsel's statement that before the expiration of the year from [19—5] the date of the policy that the insurer tendered back the premiums that had been paid on the policy—I understood that to be your statement? (To Mr. Prosser.)

Mr. PROSSER.—That's our statement, yes.

Mr. BEEBE.—No, if your Honor please, we will not admit that.

Mr. PROSSER.—That's an issue of fact, if your Honor please.

We desire to offer the application made by Yuen Tai Kam to the defendant company, dated Honolulu, March 20th, 1922, and signed by Yuen Tai Kam.

Mr. BEEBE.—No objection.

Mr. PROSSER.—Ask it be received as an exhibit and marked Exhibit "A" on behalf of the defendant.

The COURT.—Yes, the clerk will mark it.

(Received in evidence and marked Defendant's Exhibit 1.)

Mr. PROSSER.—We now desire to introduce in evidence declarations made to the medical examiner on the 21st day of April, 1922, signed by Yuen Tai Kam, witnessed by Dr. F. F. Hedemann on the same date. Any objection?

Mr. BEEBE.—No objection.

Mr. PROSSER.—Ask it be marked as an exhibit in its regular order.

(Received in evidence and marked Defendant's Exhibit 2.)

Mr. PROSSER.—Mr. Beebe, are you willing to admit that Dr. Iga Mori is still without the Territory of Hawaii? [20—6]

Mr. BEEBE.—Yes.

Mr. PROSSER.—We now desire to introduce in evidence as an exhibit in this case the stipulation between counsel for the defendant and counsel for the plaintiff relative to the testimony which Dr. Iga Mori would give if present in court, it being admitted that he is not within the Territory of Hawaii.

(Received in evidence and marked Defendant's Exhibit 3.)

Mr. PROSSER.—We now desire to introduce in evidence as an exhibit on behalf of the defendant stipulation of counsel relative to the testimony of Dr. Ed. De Meglio, and request counsel to stipulate that Dr. De Meglio is without the jurisdiction of this court.

Mr. BEEBE.—I will admit.

The COURT.—It may be received.

(Received in evidence and marked Defendant's Exhibit 3.)

TESTIMONY OF GLEN A. McTAGGART, FOR  
DEFENDANT.

GLEN A. McTAGGART, a witness called on behalf of defendant, being first duly sworn, testified as follows:

## Direct Examination.

(By Mr. PROSSER.)

Q. You are an employee of the Hawaiian Trust Company, Limited, of Honolulu? A. I am.

Q. And that company is the local agent of the Prudential Insurance Company of America? [21—7] A. Yes, sir.

Q. The defendant in this case? A. Yes.

Q. And was such local agent at the time of the issuance of the policy which is the subject matter of this action? A. It was.

Q. Do you know the plaintiff in this case, Mrs. Chun Ngit Ngan? A. Why, I know her by sight.

Q. And did you know Yuen Tai Kam during his lifetime? A. I did not.

Q. You didn't know the holder of this policy himself? A. No, I did not.

Q. You are the superintendent of the insurance department of the Hawaiian Trust Company, are you not? A. I am.

Q. Now, did you have occasion at any time to call upon the plaintiff in this action, Mrs. Chun Ngit Ngan? A. Yes, I did.

Q. When did you call upon her?



(Testimony of Glen A. McTaggart.)

A. It was on April the 7th, 1923.

Q. How do you locate that as being the date?

A. Why, we had received a cablegram from the home office of the Prudential Insurance Company that the claim was invalid and we should return the—make legal tender of the premium which had been paid to the company by the holder of the policy.  
[22—8]

Q. I will show this cablegram, dated April 4th, 1923, and ask you if that's the cablegram to which you have referred?

A. Yes, that's the cablegram.

Mr. PROSSER.—I ask that this be received in evidence as an exhibit on behalf of the defendant in its regular order.

(Received in evidence and marked Defendant's Exhibit 5.)

Q. Now, how long after the receipt of that cablegram was it before you saw the plaintiff in this case?

A. I don't remember exactly what day of the week that was, but I know it was two or three days before I could find her; it was on a Saturday morning that we found her home.

Q. Was it the Saturday after the receipt of that cablegram?

A. It was the Saturday after the receipt of that cablegram.

Q. That would be the 7th of April?

A. 7th of April.

(Testimony of Glen A. McTaggart.)

Q. Where did you see her?

A. In her home, on Riverbank Lane, I believe it is called, off Nuuanu Street.

Q. And who, if anybody, was present at the time? Did you talk with her on that occasion?

A. Yes, I spoke to her, explained the circumstances. [23—9]

Q. And who, if anybody, was present besides yourself on that occasion?

A. Mr. A. R. Lange, who is also an employee of the Hawaiian Trust Company, and Mr. Chun Tai Sun.

Q. And what, if anything, did you say to this plaintiff at that time?

A. We went in to her home and she came out and we asked her if she was the beneficiary under the policy. She said she was; she was Chun Ngit Ngan.

Q. And what did she say?

A. She said she was the wife of Yuen Tai Kam who had died and that she was the beneficiary under the policy, her name being Chun Ngit Ngan; I made that very clear before talking to her; and I then explained to her that we had received a cablegram from the home office of the Prudential Insurance Company, stating that on account of misstatements of facts that he had made to the medical examiner at the time of his examination, that the company would not pay the policy; that they wanted, in accordance with their provisions, to return the premium in full, and that I had it there. I had it in my hands at the time, the amount of the premium,



(Testimony of Glen A. McTaggart.)

and tendered it to her, in United States currency.

Q. And what was the amount of the premium which had been paid? A. \$233.95.

Q. And what was the amount that you tendered to her [24—10] in legal tender of the United States? A. \$233.95.

Q. What, if anything, did she say in answer to your statement relative to the company's repudiating the policy and the tender of the money?

A. In addition to tendering her the premium I also told her that we were ready to pay that and that we wanted the policy back in exchange for the premium; we had to take the policy up; and she said that, no, she wouldn't do that, she wanted to see her lawyer; she would want to fight it out.

Q. You demanded the return of the policy, did you? A. Yes.

Q. Unqualifiedly? A. Unqualifiedly.

Q. You didn't refuse to give her any money unless she delivered the policy?

Mr. BEEBE.—I object to that as leading.

The COURT.—Objection sustained.

Mr. PROSSER.—Q. Well, now, have you stated everything that you said to Mrs. Chun Ngit Ngan and she said to you?

A. Well, I took this—I got this money from our cashier in the office, the amount of the premium; went up there, and I had it in my hand at the time; they were—holding the bills in a fan shape so she could see the whole thing was there, and I also had a receipt, [25—11] written out for her to sign,

(Testimony of Glen A. McTaggart.)

and I said I called for the policy in exchange for the premium which had been paid. She said no, she didn't want to do that. I said, "Well, then, we can't give you the premium."

Q. What, if anything, did she say about accepting the money?

A. No, she didn't want to have anything to do with it; she refused to take the money or sign a receipt for it.

Cross-examination.

(By Mr. BEEBE.)

Q. Did you speak to her in English?

A. I spoke to her in English.

Q. She understood you?

A. She answered me in English and she talked as though she understood me.

Q. You didn't work through an interpreter at all?

A. We had this Chun Tai Sun here and in order to make doubly sure I asked him to explain it to her in Chinese so there would be no question about it.

Q. But the conversation you had was directly to her, not through an interpreter?

A. No, no, the conversation I had with her was directly with her; I might have used a little pidgin English to make sure that she understood, but I talked in English and she answered me in English in the same way.

Mr. BEEBE.—That's all. [26—12]

TESTIMONY OF CHUN TAI SUN, FOR THE  
DEFENDANT.

CHUN TAI SUN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. What is your business?

A. At the present time?

Q. Yes.

A. I am operating a cafe on Alakea Street.

Q. And what was your business on or about the 7th day of April, 1923?

A. I was an insurance agent connected with the Hawaiian Trust Company.

Q. Do you know Mrs. Chun Ngit Ngan, the plaintiff in this action? A. I do not.

Q. Have you ever seen her? A. No.

Q. Did you ever go with Mr. McTaggart to call on a Chinese woman?

A. I did call on this woman.

Q. What? A. I did call on this woman.

Q. And where did this call take place?

A. This call took place off—a cottage on Nuuanu Street—that lane, the lane I don't remember.

Q. You understand Chinese thoroughly, do you not? A. I do.

Q. And this woman was a Chinese woman, was she not? [27—13] A. She is.

(Testimony of Chun Tai Sun.)

Q. And did she understand Chinese?

A. She did.

Q. Did you talk to her in Chinese?      A. I did.

Q. Did you explain to her what Mr. McTaggart had said with reference to this insurance policy in the Chinese language to her?      A. I did.

Q. Now, as a matter of fact, did the woman understand English; did she understand any English so far as you could see?      A. That part I don't know.

Q. What, if anything, did you say to her and did she say to you relative to the cancellation by the company of this insurance policy?

A. Well, Mr. McTaggart—after Mr. McTaggart had explained to her in English, then I explained to her in Chinese and I told her that we have received a cablegram from the home office notifying the Hawaiian Trust Company that, on account of the insured making false statements to the medical examiner, that this claim will not be paid, and that now we have come up here to return the premium on that policy, and that we demand that the policy be returned to the Hawaiian Trust Company, and at the same time Mr. McTaggart had the [28—14] money in his hands.

Q. And he offered the money to her?

A. He did offer the money to her.

Q. What did she do?

A. Well, she told me that she doesn't want to return the policy, neither does she want to accept the premium, but she wants to take the whole thing in

(Testimony of Chun Tai Sun.)

full, five thousand dollars, or, if not, she will consult her lawyer.

Cross-examination.

(By Mr. BEEBE.)

Q. You say that Mr. McTaggart had the money in his hand?

A. Yes, sir, he had the money in his hands.

Q. And it was what kind of money?

A. Oh, I saw some currency and also a receipt.

Q. Saw some currency, also a receipt?

A. Yes, sir.

Q. Any silver?

A. That part I didn't see.

Q. You didn't see him hand her any silver at all?

A. No.

Q. When he handed her the money—or offered to hand it to her, how did he do it?

A. He just handed this way, see? (Showing.)

Q. What did he say about a receipt? [29—15]

A. Well, Mr. McTaggart told me to ask her to sign the receipt and take the money, if she did receive the money, and also to return the policy at the same time.

Q. Did Mr. McTaggart use you as interpreter?

A. Yes, sir, he did.

Q. He told you what to tell her, then, did he?

A. Yes, sir.

Q. Did she speak much English?

A. That part I don't know.

Q. You were present, were you?

A. I was there.

(Testimony of Chun Tai Sun.)

Q. How many English words did she say during the entire conversation that took place between the three of you and she? A. I don't know.

Q. Did she say anything other than "yes" or "no" in English? A. I don't remember.

Q. Did she speak any English?

A. She did say a few words all right; she said no, or something like that, see?

Q. She didn't engage in any extended conversation, did she?— A. No.

Q. —in English? A. No. [30—16]

Q. Did she use any sentences in English?

A. No, she did not.

Q. The only word that you recollect her saying is—the only English words that you recollect her saying is "yes" or "no," is that right?

A. "Yes" or "no."

Q. Did Mr. McTaggart say that if she took the money she would have to return the policy?

A. Yes, sir.

Mr. BEEBE.—That's all.

## TESTIMONY OF ALFRED R. LANGE, FOR DEFENDANT.

ALFRED R. LANGE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

### Direct Examination.

(By Mr. PROSSER.)

Q. Mr. Lange, what is your business or occupa-



(Testimony of Alfred R. Lange.)

tion? A. I am an insurance salesman.

Q. And what was your business on or about the 7th of April, 1923? A. Insurance salesman.

Q. And for what company?

A. For the Hawaiian Trust Company.

Q. And did you have occasion to call upon the plaintiff in this action, Chun Ngit Ngan?

A. I did.

Q. With Mr. McTaggart? A. I did. [31—17]

Q. And where did you go with him to call upon her?

A. We went to Fong Inn's the first time, trying to locate her, and found out that this woman lived up on a lane off Nuuanu Street, and we went up there about—on two occasions, and we found her, home, on the second occasion.

Q. And where was it you had—Did you have an interview with her at that time, or did Mr. McTaggart? A. Mr. McTaggart had the interview.

Q. Where did this interview take place?

A. At this woman's home.

Q. And who else was present besides you and Mr. McTaggart and this other witness that has just testified and the woman?

A. There was another elderly Chinese woman there and a—there was a Chinese boy, that is, a young man; I don't—

Q. Was the Chinese boy to whom you refer in court here?

A. Why, I could't say. He was a young man about twenty years old; I don't remember how he



(Testimony of Alfred R. Lange.)

looked.

Q. Now, on this occasion what, if anything, did Mr. McTaggart say to the plaintiff and what did the plaintiff say to Mr. McTaggart?

A. Well, Mr. McTaggart explained to the woman that the Prudential couldn't pay this claim on account of the false statement that was made to the doctor; that the—and that the company refused to pay the claim; and said [32—18] he was there for the purpose of returning the moneys or premiums that were paid in to the company, and Mr. McTaggart tried to have this woman accept the money for a receipt, and this woman declined to take it.

Q. She wouldn't take the money?

A. She wouldn't take it?

Q. And did Mr. McTaggart demand a return of the policy?

A. Mr. McTaggart—I couldn't swear whether he demanded or not; I am not certain whether he asked for the policy or not. Certain he had the money and wanted a receipt for it.

Q. What kind of money did he have?

A. He had currency.

Q. How did he offer it to her?

A. He had it in his hand; he told her about—"If you take this money and sign the receipt, why the"—that was all there was to it.

Q. And when he offered her the money what if anything did she do?

(Testimony of Alfred R. Lange.)

A. Why, she just said she wouldn't take the money; that she wanted the full amount of the policy or nothing.

Q. Did she say that in English?

A. Yes, she said it in English.

Q. How much—Just repeat the words, so far as you can recollect, that she used.

A. She just said that if she couldn't have the full [33—19] amount, five thousand dollars, that she didn't want—she didn't want to take any of it; that she would go and see a lawyer about it.

Q. That's the substance of what she said?

A. That's the substance of it, yes, sir.

Mr. PROSSER.—That's all.

Cross-examination.

(By Mr. BEEBE.)

Q. By "currency" you mean bills, do you?

A. Yes, greenbacks, yes, sir.

Q. Did he have any silver?

A. Why, if he had it in his hand I couldn't see it; I just saw these bills; he had them end out; he had hold of one end of them, had them spread out. If he had silver in the palm of his hand I couldn't say.

Q. Bills in one hand and a receipt in the other, is that it? A. Yes, sir.

Q. Now, your present impression is that she said that she wouldn't take the money; that she wanted the full five thousand dollars or she would go and see a lawyer? A. Yes, sir.

Q. And she said that in English?

(Testimony of Alfred R. Lange.)

A. She said that in English.

Q. Plain English?

A. Plain English. That is, I deal with the Chinese [34—20] more or less and, to me, she spoke better than the average.

Q. She spoke good English, then?

A. Fairly good English, yes, sir.

Q. Did she use any pidgin-English at all?

A. Well, I couldn't say whether she used any—certain words; if she used any I couldn't say.

Q. But she did use more English than “yes” or “no,” is that right? A. Yes, sir.

Q. And you say there was an old Chinese man there? A. No, a lady, an elderly Chinese lady.

Q. And a boy?

A. Young man about around twenty, I should say.

Q. How did you know that the Chinese woman that you were addressing was Chun Ngit Ngan?

A. Just through the inquiries that Mr. McTaggart had with those people in the house there.

Q. You were present, were you, all the time—

A. Yes, I was.

Q. —when Mr. McTaggart made the inquiry?

A. We went in together.

Q. I see.

Mr. BEEBE.—That's all.

Mr. PROSSER.—All that remains of our case to present is the testimony of the physicians to which I have [35—21] referred here before. I will ask that the matter go over to Monday afternoon.

The COURT.—That's agreeable, is it?

Mr. BEEBE.—Yes, that's agreeable.

The COURT.—The matter will be continued until Monday afternoon at two o'clock.

May 5, 1924, 2 P. M.

Mr. PROSSER.—Counsel has asked us to stipulate as to the date of the filing of proofs of death in this particular case. We haven't got in our possession at this time the document which would give that exact date, but we are willing to furnish it and will consent that such date as we give may go in as part of defendant's case.

TESTIMONY OF GLEN A. McTAGGART, FOR  
DEFENDANT (RECALLED).

GLEN A. McTAGGART, a witness recalled on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Mr. McTaggart, in your testimony of Friday afternoon, in response to a question propounded on your direct examination, you made the following statement: "Well then, we can't give you the premium." Now do you desire to correct that in any way?

A. Yes, I do. I remember as soon as we left the courtroom [36—22] that afternoon that you called my attention to that statement that I had made, and I denied it to you at that time and I told

(Testimony of Glen A. McTaggart.)

you that that was incorrect; that it was more in the form of a question; that is, “we can’t give you the money? You won’t accept the money”—as more of a *résumé* after having made—

The COURT.—Q. Well, what *did* you say?

The COURT.—Q. Well, what did you say?

A. Well, I said to her, “Well, then, you won’t take the money.” You see, I had offered her the premium first in English; then this Chinese boy had talked to her in Chinese and using a certain number of English words with it; I could tell when he got to the part about offering the premium returned to her, and at that particular time I also offered the premium, and further, and again, after he had got all through with the Chinese, I offered it to her again in English. Then, after all that, she said no, I said, “Well, then, you refuse to accept the premium.”

Mr. PROSSER.—Q. In other words, all this needs to be corrected, then, is a question-mark after that instead of a period?

A. Yes, “We can’t give you the money?” That is, “We can’t”—“You won’t accept the money,” is what I said to her.

Q. And what, if anything, did she say to you when you said that?

A. She says, “I won’t take the money.”

Q. Did she make any motion of any kind? [37—23]

A. Well, at the time that I offered her the money on those three occasions she like kind of backed

(Testimony of Glen A. McTaggart.)

away, kind of folded her arms, as much as to say she didn't want to have anything to do with it.

Q. Now, where did that money that you offered her come from?

A. Came from the Hawaiian Trust Company.

Q. And is that money which belongs to the Prudential Insurance Company of America?

A. It was.

Q. And is that a fund which was kept there to their credit at all times?

A. Yes, they have a credit there at all times.

Q. And what did you do with that money when you brought it back?

A. I returned it to the same account that it came from.

Q. To the same fund? A. Yes.

Q. And it has always been there ready for her, ever since? A. Yes, always been there.

Mr. PROSSER.—I think that's all.

Cross-examination.

(By Mr. BEEBE.)

Q. Did you tell this Chinese woman Chun Ngit Ngan, at the time you offered her this money, [38—24] if she didn't take it it would always be in the coffers of the Hawaiian Trust Company for her? A. No, I don't believe I did.

Q. Didn't mention it at all to her, as a matter of fact?

A. No, not there. She came down to my office again, down at the offices of the trust company,



(Testimony of Glen A. McTaggart.)

sometime just before the—she said she was leaving for China, accompanied by a young man at that time, and at that time again I offered her the premium. I didn't make the legal tender because I didn't have it with me; it was over in the cashier's cage.

Q. As a matter of fact, on this second occasion all that you said to her was, "We'll give you this money"?

A. I says, "Wait a moment; I will go and get the money." She said no, she didn't want to.

Q. You said, "Wait a minute, I will go and get you the money"?

A. Yes.

Q. Who was with her?

A. There was a rather tall young Chinese fellow there; I don't know what his name was.

Q. Is that the boy (indicating a person in the courtroom)?

A. I couldn't tell you exactly. It may be.

Q. But there was a boy?

A. There was a rather tall boy, about his build.

Q. That seems to be the man?

A. I think so. [39—25]

Q. On that occasion you didn't tell her that the money was in the safe there and was available at any time for her, did you.

A. No.

Q. What has happened between now and—or between this time and the occasion of your last testifying that has caused you to make this change? Did Mr. Prosser make the suggestion to you, or did you make the suggestion to Mr. Prosser?

A. No, I explained to Mr. Prosser when he was



(Testimony of Glen A. McTaggart.)

here; when we left the courtroom he called my attention to the fact that he had understood me to testify that way, and I denied it, and he says, "Well, I'll get a transcript of the testimony." As soon as he got that, why I could see there was a possibility of there—of a wrong construction being put on it.

Q. Did you tell her at that time that you had to have a receipt for this money?

A. No, no mention was made of a receipt. I had a receipt with me.

Q. Then you want to change all your testimony about asking of her a receipt?

A. No, I made no statement regarding receipt.

Q. You made no statement?

A. I said in that—

Q. Just a minute. You made no statement relative to demanding a receipt from her, in your original testimony? [40—26]

A. I said that she had refused to sign a receipt.

Q. Well, then, you did, then, ask her to sign a receipt?

A. Yes, I must have asked her to sign a receipt, but it wasn't the—

Q. Never mind; just answer my question.

A. All right.

Q. And you also did demand a return of the policy? A. I asked her for the policy.

Q. But you want the Court to believe now that you didn't make the giving of a receipt or a de-

(Testimony of Glen A. McTaggart.)

mand for her return of the policy contingent upon her accepting the money?

A. Oh, no, no; that wasn't contingent on her accepting the money at all.

Mr. BEEBE.—That's all.

Redirect Examination.

(By Mr. PROSSER.)

Q. When you—On this second occasion when you told her you would go for the money what did she say?

A. She said no, she didn't want me to go; wouldn't wait; they got up and started out in company.

Mr. PROSSER.—That's all. [41—27]

TESTIMONY OF DR. F. F. HEDEMANN, FOR  
DEFENDANT.

Dr. F. F. HEDEMANN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a practicing physician and surgeon, duly licensed to practice in Honolulu?

A. Yes, sir.

Q. Territory of Hawaii. A. Yes, sir.

Q. And of what institutes of learning are you a graduate?

A. Harvard University and Columbia University.

Q. You mean the Columbia Medical school?

(Testimony of Dr. F. F. Hedemann)

A. Columbia Medical, yes.

Q. College of Physicians and Surgeons?

A. College of Physicians and Surgeons.

Q. How long have you been practicing in the city and county of Honolulu, Territory of Hawaii?

A. Since 1909.

Q. In the month of April and on, to wit, April 21st, 1922, did you occupy any position in so far as the Prudential Life Insurance Company of America is concerned?

A. I was one of their examiners.

Q. And by that you mean one of their medical examiners? A. Medical examiners.

Q. I will ask you if, on that date, one Yuen Tai Kam, [42—28] Chinese, came to you to be examined for a policy in the Prudential insurance company? A. He did.

Q. I show this document, referred to as declarations made to the medical examiner, and ask you if that's your signature attached to that document?

A. It is.

Q. I will call your attention to all of the writing on that document with the exception of the signature of Yuen Tai Kam and ask you if that's in your handwriting? A. Yes, sir, all mine.

Q. Now, Doctor, this signature M. M. M., "Yuen Tai Kam," was that placed on there in your presence?

A. All signatures are in my presence. All applicants sign in my presence.

Q. Now, I see that you, under this document here,

(Testimony of Dr. F. F. Hedemann)

are required to ask the proposed insured certain questions. Did you propound those questions to the insured? A. All questions were propounded.

Q. And did he answer those questions?

A. All answered.

Q. And did you in every case put down his answer there in your own handwriting at the time that he made the answer? A. Those are his answers.

Q. Now, in answer to question number eight, to wit, [43—29] “Are you now in good health?”, did he respond “Yes” as indicated by your handwriting? A. He must have, yes, sir.

Q. In response to question number nine, “On what dates and for what complaints have you been attended by a physician during the past 3 years?” I will ask you if he responded to that question with the word, “None.”

A. Yes, or words to that effect.

Q. I believe you placed the “None” there; that is in your handwriting? A. In my handwriting.

Q. And referring to the different questions contained in question number ten, did you propound each and every one of those questions to the insured? A. All questions were propounded.

Q. And in answer to each one of them he gave the answer “No,” as indicated by—in your handwriting? A. He did.

Q. Now, relative to the question in regard to spitting of blood, he answered “No” to that, did he?

A. He answered “No.”

Q. Now, Doctor, how long have you been acting

(Testimony of Dr. F. F. Hedemann)

as the medical examiner for this insurance company? A. I think it is five years. [44—30]

Q. And have you acted as medical examiner for other insurance companies? A. Two others.

Q. Now, take this particular question as to spitting of blood, supposing that the insured—or the party seeking insurance, instead of answering “No” as indicated by this report here, had answered “Yes,” what significance would that have had in your mind?

A. Well, very important significance. It would mean that probably there was some trouble there which had to be investigated.

Q. Now, I see by this report that, as the result of your physical examination and as the result of his answers to these various questions, you reported him as first-class—

Mr. BEEBE.—I object to that as assuming a state of facts not in evidence.

(Question withdrawn.)

Mr. PROSSER.—Q. I see by this report, Doctor, that you reported this risk as first-class?

A. I did.

Q. Now, upon what was that report of yours based?

A. Based on his answers to me and my findings in examination.

Q. His answers to you as indicated by this particular report? A. Yes, on the report. [45—31]

Q. Now, if, as a matter of fact, when you had propounded to him the question No. 9, “On what dates



(Testimony of Dr. F. F. Hedemann)

and for what complaints have you been attended by a physician during the past 3 years?" he told you that he had been attended by four or five different physicians, and that he had been afflicted with spitting of blood, would you have passed him as first-class?     A. No.

Q. Would you have passed him at all?

A. I would give him the lowest rating that I could give him. The company allows the ratings of first-class, average, and poor, but if you give anything but first-class you have got to give reasons on the examination sheet.

Q. But when you pass a man as first-class, then what happens?

A. You don't have to give any explanation on it.

Q. Doctor, it is stipulated between the parties hereto that Dr. De Meglio, of Oklahoma City, would testify as follows: That he knew the deceased, Yuen Tai Kam, and he was under his professional care for a few weeks prior to December 7th, 1921. At that time the said Yuen Tai Kam suffered periodical hemorrhages from his buccal cavity, which he and several doctors attributed to be from his lungs. Any pulmonary bleeding is a symptom of advanced tuberculosis and is always accompanied by a severe cough. I found no cough present, [46—32] so, by means of a long laryngeal applicator, took some smear from his bronchus and had it examined, also took some of the blood. Both showed no tuberculosis whatever, only a mixed infection, mostly streptococci. After a thorough examination of his naso-

(Testimony of Dr. F. F. Hedemann)

pharynx, found the bleeding-point on the posterior end of the lower turbinate consisting of an ulcer over a varicose blood-vessel. The blood examination showed him to be slightly hemophilic and the nasal infection to be from his right frontal sinus. I removed the middle turbinate, to provide free drainage, and injected subcutaneously over his chest 10 cc"—what does that "cc" mean, Doctor?

A. Cubic centimeters.

Q. "10 cc of thromboplastin every day, four times. All the bleeding has stopped so far. If he should show any trace of it again, would advise you to give him elixir chlorocalcium with ergotol combined, four times daily. Otherwise I would like you to give him hypodermically on his return, the Galen-tonic which I send, every other day, alternating No. 1 and 28. After that, let him take the Bland mass pills I send until used up. I would appreciate greatly to hear from you in regard to his case, from time to time, and remain yours fraternally. That said Dr. De Meglio is a physician legally qualified to practice his profession within the State of Oklahoma and that the foregoing [47—33] statement was contained in a letter by him directed to Dr. Chang of Honolulu, which said letter was dated December 7th, 1921.

And the further stipulated evidence of Dr. Mori—  
You know Dr. Mori, do you not?

A. Yes, personal friend of mine.

Q. He is a practicing physician—?

A. He was; I think he's away now.

(Testimony of Dr. F. F. Hedemann)

Q. But was he a physician of good standing in the profession?

A. Yes, among the best of the Japanese.

Q. It stipulated that Dr. Mori, if present, would testify as follows: That he is a physician, duly licensed to practice in the Territory of Hawaii and that, as such licensed physician, he treated Mr. Yuen Tai Kam, a Chinese merchant, for neurasthenia and hemoptysis (spitting of blood); from January 21st, 1922, to May 22d, 1922, and that prior to said dates the said Yuen Tai Kam had been going to said Iga Mori for treatment for several years.

Now, if, in addition to that, you knew that he had consulted Dr. Chang, and Dr. Arnold of the Clinic, and Dr. Schnack, relative to his physical condition, before he came to you, would you have passed him?

A. Not a chance.

Q. And would the company have accepted such a risk? [48—34] A. I doubt it.

Mr. BEEBE.—I object to that.

The COURT.—I think that's a conclusion.

Mr. PROSSER.—Q. Have you ever had any experience with the company in cases where you have reported a risk as poor?

A. Whether or not they accepted it in spite of that?

Q. Yes.

A. I don't know; you will have to ask Mr. McTaggart.

Q. I mean have you personally?

A. No, I have not had.

(Testimony of Dr. F. F. Hedemann)

Q. Have you ever known them to do it?

A. No, I—

Mr. BEEBE.—I object to that as leading.

The COURT.—Objection sustained.

The WITNESS.—It's out of my domain—perhaps I don't understand you—

Mr. PROSSER.—Q. Doctor, in any case where you have reported an applicant for insurance as poor— A. Yes.

Q. —has the company granted insurance?

Mr. BEEBE.—I object to that question upon the ground there's no showing that he did—

A. I don't know that they have, no; personally I don't know of any case. They have often come back to me and written letters to me and asked me to go further into [49—35] the case; but what the ultimate result was I don't know, any of them.

Cross-examination.

(By Mr. BEEBE.)

Q. Did you know this man Yuen Tai Kam?

A. No.

Q. All you know was that he came to your office?

A. I have no recollection of the man whatever; never known him.

Q. You have no personal recollection now what he looks like?

A. None whatever. I didn't know he was dead, even.

Q. Now, you say that you put each and every one of these questions to Yuen Tai Kam?

(Testimony of Dr. F. F. Hedemann)

A. I put them to all applicants.

Q. Then you based your answer upon your general custom, not upon your present knowledge of this particular case?

A. I can't, because I can't remember the man. All questions were put to all applicants.

Q. Now, is it possible, Doctor, that Yuen Tai Kam, in answer to question eight, when you said "Are you in good health?" he said, "So far as I know?"

A. Quite impossible for me to say. I got the impression that he said—used the word "Yes."

Q. Possible that he might have said, "As far as I know"? A. He might have; I don't know.

Q. And in answer to various other questions, whether or [50—36] not he had consumption or things of that nature, it's possible that he might have said to you, "So far as I know I have not"?

A. I don't know about that, because if he did there would be an element of doubt in my mind and I would have to go into it in greater detail.

Q. Then would you say that in every case where a person says, "So far as I know, no" you make tests of them?

A. I ask them further what their—"What do you know? and why are you not sure?"

Q. Well, the particular question, where a question says, "Have you had syphilis?" and he says, "So far as I know, no," do you make the blood test?

A. No, the company does not require that. I have to ask the symptoms, see if he has had any of



(Testimony of Dr. F. F. Hedemann)

the symptoms that were suggestive of that disease.

Q. Then, in answer to this question whether or not he had ever had syphilis, it is a possibility that he might have said, "So far as I know, no," isn't that true? A. Possible, I suppose.

Q. And that's also true of consumption,—“so far as I know, no”?

A. Well, he gave me pretty—To write it down “no” he gave me the impression it was no.

Q. But he might have said, “So far as I know, no?”

A. He might have; I don't know what he might have done; I can't remember. [51—37]

Q. Hundreds of people walk the streets without knowledge that they have consumption? that's true?

A. Perfectly.

Q. You, of course, made a physical examination of him? A. Absolutely.

Q. The mere fact that he gave answers to questions didn't preclude you from checking him up or making some physical examination?

A. Everything on that paper has been gone over by me.

Q. And so from your physical examination made at that time you conceived that his answers were correct?

A. I didn't figure one way or the other. I took it for granted they must be correct. I couldn't find any physical signs, so I passed him first-class, because of the answers and my findings.

Q. He showed no physical signs of tuberculosis?

(Testimony of Dr. F. F. Hedemann)

A. Certainly did not. I couldn't hear them if they were. I would have made a notation of those, not passed him as first-class.

Q. You used the same instruments on him, did you not, Doctor, that you did on me when you examined me? A. Yes.

Q. That is, you sounded him and— A. Yes.

Q. And used that ear instrument,—what do you term it? A. Stethoscope.

Q. And by using the stethoscope, Doctor, what do you [52—38] determine,—whether or not his hear is good, and lungs?

A. Yes, the condition of the heart; his heart sounds and lung sounds,—whether you hear anything wrong.

Q. And by your use of the stethoscope did you not determine then that his answers as regards consumption and heart were all right?

A. Sounded all right to me.

Q. What does the presence of streptococci in the human body indicate?

A. Well, that's a pretty big question. May indicate several things. May lie there dormant, or may be in the active stage and cause an active infection.

Q. Anyone might have streptococci?

A. I suppose I might have some in my body, but I hope not.

Q. Every normal individual might have them and still be in good health?

A. I don't know about that. Streptococcus is a pretty strenuous "bug" to have.

(Testimony of Dr. F. F. Hedemann)

The COURT.—Q. What is it?

A. It is one of the bacteria; a germ.

Q. Located in the mouth?

A. No, not necessarily in the mouth. Nasal passages—of any part of the body.

Mr. PROSSER.—Q. Would you say that anyone who had streptococci in his system was a good risk?  
[53—39]

A. Well, I can't say. (Laughs.) That's a question pretty hard to put to me. I don't believe I can answer that intelligently.

Mr. BEEBE.—Q. A healthy person may have them and still be perfectly healthy?

A. I suppose might have one or two. I don't know; I can't—Nobody could answer that question. Perhaps Dr. Arnold later on can help you.

Mr. BEEBE.—I think that's all, Doctor.

Mr. PROSSER.—That's all, Doctor.

## TESTIMONY OF DR. WAH KAI CHANG, FOR DEFENDANT.

DR. WAH KAI CHANG, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

### Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a duly licensed physician in the City and County of Honolulu, Territory of Hawaii? A. Yes, sir.

(Testimony of Dr. Wah Kai Chang.)

Q. And of what medical schools are you a graduate?    A. Rush Medical, Chicago.

Q. How long have you been practicing medicine in Honolulu?    A. Three years.

Q. I will ask you if you know the subject of this picture here, who is here referred to as Yuen Tai Kam?    A. Yes, I do.

Q. And did you know him in or about the month of April [54—40] 1922?    A. Yes.

Q. You had known him a long time?

A. I knew him a long time.

Q. Did he have any name other than Yuen Tai Kam?    A. V. C. Inn.

Q. Now, do you remember receiving a letter from Dr. De Meglio?    A. I did.

Q. Relative to Yuen Tai Kam?    A. Yes.

Q. I will ask you if that's the letter which has been referred to and which has heretofore been placed in evidence as an exhibit?    A. Yes.

Q. You heard this—You heard me read this letter, did you not, a minute ago?    A. Yes.

Q. And that's a true statement of the letter which—    A. Yes.

Q. —you received from Dr. De Meglio?

A. No, I received it from Yuen Tai Kam; he brought it to me.

Q. He brought it to you himself?

A. Himself.

Q. And then he consulted you in regard to his troubles? [55—41]

Mr. BEEBE.—Might I suggest, if your Honor

(Testimony of Dr. Wah Kai Chang.)

please, that he don't lead the witness.

(Question withdrawn.)

Mr. PROSSER.—Q. Now, after Yuen Tai Kam had brought you that letter what if anything, did you do for him or did he ask you to do for him?

A. I referred him to Dr. Clarke.

Q. Dr. Clarke? A. Yes, sir.

Q. And do you know whether or not he went to see Dr. Clarke? A. Yes.

The COURT.—Q. Of your own knowledge?

A. No, I don't.

Mr. PROSSER.—Q. Did he make any statement to you?

A. He said he was going to see Dr. Clarke.

Q. That's all you know about it? A. Yes.

Q. Did you examine him physically in any way?

A. I never did.

Q. And that's all you know about that?

A. Yes, sir, that's all I know about him.

Q. And what was this other name that you gave?

A. V. C. Inn.

Q. Did he make any statement to you relative to his physical condition?

A. Well, he complained of having bleeding from the nose [56—42] on and off for the past five or six months at the time that he came to see me.

Q. And anything else?

A. That's all. Cough occasionally. He complained of an itching because of the blood, trickles down his throat from the nose.

Q. And when was this, Doctor?

(Testimony of Dr. Wah Kai Chang.)

A. I don't remember whether it was before or after he went away to the States.

Q. Well, it was—He brought that letter from Dr. De Meglio?      A. Yes.

Q. So it was after that?

A. I was attending his wife for the past—long before he went away, on maternity case.

Q. Of course you saw him before he went to see Dr. Clarke?

A. Yes. No, I don't know what time he went to see Dr. Clarke.

Q. But you saw him before that?      A. Oh, yes.

Cross-examination.

(By Mr. BEEBE.)

Q. Has all of your active practice been down here in Honolulu?      A. Beg pardon? [57—43]

Q. All of your active practice has been here in Honolulu?      A. Yes, in Honolulu.

Q. You have just been practicing three years?

A. Three years.

Mr. BEEBE.—That's all.

TESTIMONY OF DR. HOWARD CLARKE,  
FOR DEFENDANT.

DR. HOWARD CLARKE, a witness called on behalf of the defendant, being first duly sworn, testified as follows:



(Testimony of Dr. Howard Clarke.)

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a practicing physician in Honolulu? A. I am.

Q. And have been for some time?

A. Since 1920, if I recollect.

Q. And of what college or university are you a graduate?

A. Medical department of Tulane University of Louisiana.

Q. How many years have you been practicing medicine? A. Since 1903.

Q. Now I will ask you if you have had occasion to examine the physical condition of one Y. C. Inn during the year 1922? A. Not under that name.

Q. V. C. Inn? A. Yes.

Q. V. C. Inn. A. Yes. [58—44]

Q. I will show this picture and ask you if you recognize it? A. I do. I have seen it before.

Q. Can you state when you had occasion to examine into the physical condition of the party named? A. January, 1922.

Q. And was anybody with you at the time you made that examination?

A. You mean by way of a physician?

Q. Yes, by way of a physician.

A. To the best of my recollection on that date Dr. Chang brought this patient to me for examination of his nose and throat.

Q. And you made such an examination?

(Testimony of Dr. Howard Clarke.)

A. I did.

Q. And what were your findings as a result of that examination?

A. The man complained of bleeding from his—back of his throat, with a history of having been operated on a month previously in the States. My findings were scars along the turbinate bone from the operation, which had entirely healed. The man was pale, anemic, and an examination of his larynx showed a condition highly suspicious of tuberculosis. I found below the vocal cords evidences of blood, which undoubtedly came from below rather than from above the vocal cords down. I had an X-ray taken of his head and made the statement [59—45] that I felt tuberculosis would be found in his lungs and recommended a lung examination by Dr. Arnold. Anything more?

Q. Did you see any X-rays of his lungs?

A. Yes.

Q. What do they indicate?

Mr. BEEBE.—Just a minute. The X-rays are the best evidence of what they indicate.

The COURT.—Probably. I don't know what the rule would be about that exactly. If it is like a writing, of course or photograph—Have you the X-ray?

Mr. PROSSER.—No, we have not. We have looked for it and cannot find it.

The COURT.—Have you got those X-rays, Doctor?

A. I have not. The X-rays are at the Clinic.

(Testimony of Dr. Howard Clarke.)

Q. And can you produce them?

A. They belong more to Dr. Arnold's department than to mine, but I think he can produce them.

Mr. PROSSER.—Subject to our producing them, may he go ahead and testify, Mr. Beebe?

Mr. BEEBE.—Yes, I am perfectly willing. I will ask that they be produced so that we can submit them to other physicians.

The COURT.—You get them, Doctor, please.

Mr. PROSSER.—Q. And what does an examination of these X-rays to which you have referred indicate? [60—46]

A. I don't feel qualified to pass judgment on the X-ray findings, because that branch of work belongs more to Dr. Arnold; he is better able to answer you this, because I take the head, with the neck, but in this case I had suspicions that the man had tuberculosis and recommended another man to listen to his chest.

Q. Now you have acted, have you not, as medical examiner for insurance companies?

A. Yes, on occasions.

Q. On occasions. From what you know of this particular case would you have passed this man as a subject for insurance?

A. I would like to evade that question, in a way, because I wasn't looking at the man as an insurance risk; I was passing only on the man from the neck up, as to where the bleeding came from and the cause of that condition.

Q. And your finding was what, as to where the

(Testimony of Dr. Howard Clarke.)

bleeding came from?

A. Below the neck and from the lungs. I felt the man would be found to have tuberculosis, and I was surprised when it was reported that he didn't have it.

Mr. PROSSER.—I now desire to introduce in evidence, if your Honor please, this picture.

Mr. BEEBE.—I have no objection.

Mr. PROSSER.—I desire to introduce in evidence, if your Honor please, a newspaper print, showing picture [61—47] of the insured referred to in this particular action, which has been identified by two witnesses.

The COURT.—Very well.

Mr. PROSSER.—I will ask that it be introduced in evidence.

Mr. BEEBE.—I am just consenting to the introduction of the picture, and not to the printed matter.

Mr. PROSSER.—It is understood, nothing but the picture.

#### Cross-examination.

(By Mr. BEEBE.)

Q. You are the eye, ear, nose and throat specialist for the Clinic? A. Yes, I am.

Mr. BEEBE.—That's all.

The COURT.—Stand aside.

Mr. BEEBE.—Q. Are you an examiner for the Prudential Life Insurance Company?

A. I am not.

(Testimony of Dr. Howard Clarke.)

Q. Did you tell this young man, Yuen Tai Kam, that you thought he had tuberculosis, at the time you made this examination?

A. I didn't tell him that he had, because I didn't know whether he had or not, but I thought he had, and I sent him to my partner for examination to confirm that fact. I was not considering him as an insurance man, I was advising to find out whether he had tuberculosis or not.

Mr. BEEBE.—That's all. [62—48]

TESTIMONY OF DR. HARRY L. ARNOLD, FOR  
DEFENDANT.

DR. HARRY L. ARNOLD, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. PROSSER.)

Q. Doctor, you are a practicing physician and surgeon in the city and county of Honolulu, Territory of Hawaii? A. Yes, sir.

Q. And of what medical schools are you a graduate? A. University of Michigan.

Q. How long have you been in the active practice of medicine and surgery? A. Since 1911.

Q. How long have you been in Honolulu practicing? A. Since 1919.

Q. And you are one of the specialists attached to the Clinic? A. Yes, sir.

(Testimony of Dr. Harry L. Arnold.)

Q. What is your specialty?

A. Internal medicine.

Q. I will ask you to look at this picture of one Yuen Tai Kam and ask you whether at any time he was a patient of yours?

A. I knew him under the name of V. C. Inn.

Q. Do you know when you treated him and for what?

A. It was in January, I think, of 1922. I know that only from having my memory refreshed by having it spoken [63—49] here. I am not sure about that date without looking up the record.

Q. Well, you are—you haven't looked up your record?

A. Dr. Clarke has the record here; if you will let me look at it? (Consults record.) Yes, January 13th, 1922.

Q. And on January 13th, 1922, did you make an examination of V. C. Inn, otherwise known as Yuen Tai Kam? A. Yes, sir, I did.

Q. And what was the result of such examination as you made?

A. I found no evidence of disease in his chest.

Q. Did you examine him as to any other portions of his body?

A. No, sir, only his lungs and heart.

Q. Lungs and heart? A. Yes, sir.

Q. And you found nothing to indicate that he had tuberculosis?

A. No, sir, not from my examination of him.

Q. And that was X-ray?



(Testimony of Dr. Harry L. Arnold.)

A. No, I made no X-rays except of his head; I made no X-ray of his chest.

Q. Well, you say you made no examination of his head or throat or nose?

A. No, sir, because he came from Dr. Clarke to me with [64—50] the request that I examine his lungs and heart for possible source of bleeding, and I found none on my examination of his chest.

Q. That is, so far as you could see, the bleeding did not come either from the chest or the heart?

A. I gave that as my opinion at that time and it still is, yes, sir.

Q. What was his general physical appearance at the time you examined him?

A. He looked to be distinctly below normal health; his health appeared to me to be somewhat impaired; rather pale.

Q. Did he make any statement to you with reference to his health or physical condition?

A. Other than that he had been spitting blood and bleeding, that's all I remember.

Cross-examination.

(By Mr. BEEBE.)

Q. You found his lungs all right, doctor?

A. Found no evidence of tuberculosis, which was what I was looking for.

Q. And his heart all right, also? A. Yes, sir.

Q. And you say you made an X-ray of his head?

A. I made an X-ray of his head.

Q. Did that indicate that he was all right, too?

[65—51]

(Testimony of Dr. Harry L. Arnold.)

A. Yes, sir.

Q. In other words, outside of his external appearance, of being pale, etc., he seemed all right, is that true? A. Yes, sir.

Q. By "all right" I mean in good health.

A. He was pale, as I remember; I think I remember distinctly his being pale at the time.

Q. That might have come from bleeding, anemia, or anything else? A. Yes, sir.

Q. That indicated not an excess of blood, isn't that true? A. Yes.

#### Redirect Examination.

(By Mr. PROSSER.)

Q. Was there anything to indicate the source of the bleeding, so far as your examination was concerned?

A. Not so far as my examination of him was concerned, no, sir.

Q. Was there anything to indicate that he had been bleeding, so far as your examination was concerned? A. Only his say-so.

Mr. PROSSER.—That's all.

Mr. BEEBE.—That's all.

Mr. PROSSER.—Now, if your Honor please, I desire to move that the answer heretofore filed in here by the [66—52] defendant be amended by the addition thereto of a third paragraph to read as follows,—that being the amendment of the pleading to conform to the proof: "Third. That subsequent to the death of Yuen Tai Kam, named as the

insured in said policy of insurance, the 7th day of April, 1922, and prior to the expiration of one year from the date thereof, defendant notified Chun Ngit Ngan, named in said policy as beneficiary thereunder, that it refused to recognize said policy as valid because of false and erroneous statements made by the insured upon his examination by the medical examiner for defendant, prior to the issuance of said policy, and did then and there tender to said Chun Ngit Ngan the entire sum theretofore paid as premiums under said policy, which tender was refused by the said Chun Ngit Ngan, and did demand a return of said policy by said Chun Ngit Ngan to the defendant.”

Mr. BEEBE.—We object to the offer to amend, if your Honor please, upon the ground that it is wholly immaterial and wholly incompetent, our position being, if your Honor please, that the facts set forth do not constitute a defense; in other words, that by contesting an insurance policy is meant, not a refusal to pay, or tender back of premiums, but the institution of an action within one year to cancel and set aside the policy.

The COURT.—I will allow the amendment to be filed, without [67—53] committing myself to the proposition of whether it is a good defense or not.

Mr. BEEBE.—Note an exception.

Mr. PROSSER.—We close our case, your Honor.

The COURT.—Have you anything more?

Mr. PROSSER.—Oh, one minute more. Mr.

Beebe, I will ask you to state in open court now whether the plaintiff in this case is still alive?

Mr. BEEBE.—I think she is still alive. I will have to ask. (After speaking with persons in the courtroom.) She is still alive, if your Honor please, or was at last reports. She was a week ago and she is coming back to Honolulu.

The COURT.—Have you anything further?

Mr. BEEBE.—I think that's all, if your Honor please.

I hereby certify the above 53 pages foregoing to be a complete and accurate transcript of my shorthand notes of the proceedings had and the testimony taken during the trial of the above-entitled case.

JAMES L. HORNER,  
Official Reporter.

[Endorsed]: Filed at 11:40 o'clock A. M. June 23, 1924. [68—54]



# THE PRUDENTIAL

## INSURANCE COMPANY OF AMERICA

IN CONSIDERATION of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby endows and insures the person herein designated as the Insured, for the amounts named herein, payable as specified, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

**THE INSURED**

YUEN TAI KAM

**FACE AMOUNT OF INSURANCE**

--- FIVE THOUSAND ---

Dollars,

payable at the Home Office of the Company, in Newark, New Jersey, twenty years after the date hereof, on the first day of May, 19 42, provided the Insured be then living and this Policy be then in force; or immediately upon receipt of due proof of the prior death of the Insured while this Policy is in force.

**PAYABLE TO THE INSURED**, if living twenty years after the date hereof, or, in case of the prior death of the Insured, to CHUN NGIT NGAN, Beneficiary, wife of the Insured.---

**ACCIDENTAL DEATH BENEFIT**

--- FIVE THOUSAND ---

Dollars,

payable to the Beneficiary in addition to the Face Amount of Insurance, in event of death by accident as defined in the clause headed "Provisions as to Accidental Death Benefit," on the second page hereof, subject to the provisions therein set forth.

If there be no Beneficiary living at the death of the Insured the amount of insurance payable shall be paid to the executors, administrators or assigns of the Insured, unless otherwise provided in the Policy. The right to change the Beneficiary has been reserved by the Insured.

**TOTAL AND PERMANENT DISABILITY BENEFITS.**

**MONTHLY INCOME** . . . **TEN DOLLARS PER MONTH FOR EACH \$1000** . . . of the Face Amount of Insurance, payable to the Insured in event of total and permanent disability before age 60, subject to the provisions as to Total and Permanent Disability contained in the Policy. **WAIVER OF PREMIUMS** in event of Total and Permanent Disability as hereinafter provided.

**ANNUAL PREMIUM** . . . . . **Two Hundred Thirty-three and 95/100** . . . Dollars, payable on the delivery of this Policy, the receipt of which premium is hereby acknowledged, and a like amount payable thereafter at the Home Office of the Company, or as provided under the heading "General Provisions" on the second page hereof, in exchange for the Company's receipt on or before the following due dates, the first day of May . . . . . in every year during the continuance of this Policy, until twenty full years' premiums shall have been paid, or until the prior death of the Insured.

**IN WITNESS WHEREOF**, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this first day of May . . . . . one thousand nine hundred and twenty-two . . . . .



*Homer A. Snyder*  
President

*Richard J. Hamilton*  
Secretary

Age 28

Twenty-Year Endowment Policy Annual Dividends. Premiums Payable for Twenty Years. Accidental Death Benefit. Total and Permanent Disability Provision. Monthly Installments Without Deduction from Insurance. Waiver of Premiums.

1225-5-40

FOUNDED BY JOHN F. DRYDEN  
PIONEER OF INDUSTRIAL INSURANCE IN AMERICA

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## GENERAL PROVISIONS.

**Payment of Premiums.**—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable quarterly or semi-annually, any unpaid premiums required to complete payment for the current insurance year in which death occurs shall be considered an indebtedness to the Company on account of this Policy. Premiums are payable at the Home Office of the Company, but may be paid to an authorized agent of the Company. If any premium dates when due, in exchange for official receipts signed by the President or the Secretary and controller, this Policy shall be void and all premiums forfeited to the Company, except as herein provided. The date not paid when due, as specified on the first page hereof, this Policy shall be void and all premiums forfeited to the Company, except as to the benefits provided for herein payment of any premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

**Grace in Payment of Premiums.** In the payment of any premium under this Policy, except in the case of a renewal premium, the insured shall have a grace period of 30 days after the date the premium is due. If the premium is not paid within the grace period, the Policy shall become a claim under the grace period the unpaid premiums for the then current policy year shall be deducted from the amount of insurance payable.

**Change of Beneficiary.**—If the right to change the Beneficiary has been reserved and the Insured desires to change the Beneficiary, he shall give written notice to the Company at its Home Office, change of the State in which the Insured resides, the Insured may at any time while this Policy is in force, by giving a notice to the Company at its Home Office, change the Beneficiary or Beneficiaries under this Policy, such change to be subject to the rights of any prior assignment and to become effective only when a provision to that effect is endorsed on or attached to the Policy by the Company, whereupon all rights of the former or Beneficiary or Beneficiaries shall cease, and the Beneficiary or Beneficiaries shall survive, and the Insured shall be deemed to have knowledge of such assignment unless the

**Assignments.**—Any assignment of this Policy must be in writing, and the Company shall not be bound by any assignment of this Policy unless the original or a duplicate thereof is filed at the Home Office of the Company. The Company will not assume any responsibility for the validity of an assignment.

**Suicide.**—If within one year from the date hereof the Insured shall die by suicide—whether sane or insane—the liability of the Company shall not exceed the amount of the premiums paid on this Policy.

**Incontestability.**—This Policy shall be incontestable after one year from its date, except for non-payment of premium, but in the case of the insured being a minor, the amount or amounts payable under this Policy shall be such as the premium would have purchased at the correct age.

**Indebtedness.**—Any indebtedness to the Company on account of this Policy will be deducted in any payment or payments or in any settlement under the Policy.

**Reinstatement.**—If this Policy be issued for non-payment of premium it will be reinstated any time within one year after the expiration of the term of the Policy, upon the payment of the arrears of premium with interest at the rate of five per cent. per annum, together with the reinstatement of all indebtedness, provided such indebtedness be not greater than the cash value of this Policy at the time of application for such reinstatement, and provided evidence of the insurability of the Insured satisfactory to the Company be furnished.

**Modifications, etc.**—No condition, provision or privilege of this Policy can be waived or modified in any case except by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, or one of the Assistant Actuaries. No modification or alteration of the above conditions, provisions or privileges can be made in accordance with the laws of the State in which the same is issued. No Agent has power in this behalf for the Company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the Company by making any promise, or by making or receiving any representation or information.

**Basis of Reserve and Computations.**—The reserve upon this Policy for funds here to be held, exclusive of any reserve or account for death benefits, shall be computed upon the American Experience Table of Mortality with three and one-half per cent. interest per annum by the net level premium method. All computations in accordance with the terms of this Policy involving net premiums or reserve values based on a mortality table and interest shall be made upon the basis here stated.

**Entire Contract Contained in This Policy.**—This Policy together with the Application, a copy of which is attached hereto, contains and constitutes the entire contract between the parties hereto, and all statements made by the Insured shall in the absence of fraud be deemed representations and not warranties, and no statement shall avoid the Policy or be used as a defense to a claim thereunder unless it be contained in the Application for the Policy and unless a copy of such Application be endorsed upon or attached to the Policy when issued.

## DIVIDEND PROVISIONS.

Annually during its continuance in force, if all premiums theretofore due have been paid, this Policy will be credited with a dividend from the surplus earnings of the Company as ascertained and apportioned by the Board of Directors. Such dividend shall be (1) paid in cash or (2) applied to the reduction of the premium then due, if any; or upon written request of the Insured it may be (3) applied to the purchase of a paid-up addition to the Policy, or (4) left to accumulate to the credit of the Policy with interest at the rate of three and one-half per cent, per annum plus such additional interest as the Company may determine to allow and payable on the date of the next annual renewal of the Policy, or (5) applied to any annuity or other benefit which may be provided at any time for its full or partial payment at the time of such surrender. The Company reserves the right to defer the payment of any cash surrender value for a period not exceeding ninety days after application for such cash surrender value. If the Insured shall select no other dividend option the dividend shall be paid in cash.

### PROVISIONS AS TO ACCIDENTAL DEATH BENEFIT.

The amount of Accidental Death Benefit specified on the first page hereof shall be payable in addition to the Face Amount of Insurance immediately upon receipt of proof from the Home Office of the Company that the death of the Insured occurred during the continuance of this Policy and prior to the maturity of the Policy as an Endowment, while there was no default in the payment of premium, as a result, directly and independently of all other causes, of bodily injuries, effected solely through external violent and accidental causes and that such death occurred within sixty days of the accident, provided that the death of the Insured was not caused in whole or in part by the Insured engaged in military or naval service or in aviation or submarine operations; from a state of war or insurrection; or, directly or indirectly from disease in any form; and provided, further, that if any Total and Permanent Disability Benefit, as hereinafter provided, shall be allowed under this Policy, these provisions as to Accidental Death Benefit shall be null and void.

Before making any payment on account of accidental death, the Company shall have the right and opportunity to examine the body and make an autopsy unless prohibited by law.

The Accidental Death Benefit is granted in consideration of the payment of an extra, ..... annual premium of \$ ..... , which is included in the amount of the premium stated on the first page hereof and which is payable at the same time and subject to the same provisions as to payment as the regular premium under this Policy.

PROVISIONS AS TO TOTAL AND PERMANENT DISABILITY—WAIVER OF PREMIUMS—  
MONTHLY PAYMENTS TO THE INSURED.

**Disability Before Age 60—Waiver of Premiums.**—If the Insured, after the first premium on this Policy has been paid, shall furnish due proof to the Company, while this Policy is in full force and effect and while there is no default in the payment of premium, that he, at any time after payment of such first premium, while less than sixty years of age, from any cause whatsoever shall have become permanently disabled or physically or mentally incapacitated to such an extent that he by reason of such disability or incapacity is rendered wholly and permanently unable to engage in any occupation or perform any work for any kind of consideration, then the Company will, at the option of the Insured, either (1) pay to the Insured the full amount of the cash value of this Policy at the time of such disability, or (2) continue to pay the full amount of the cash value of this Policy during such disability. Without prejudice to any other cause of disability, the permanent loss of the sight of both eyes, or loss by severance of both hands above the wrists, or of both feet above the ankles, or of one hand and one foot, shall be considered disability or incapacity within the meaning of this provision.

**Disability Before Age 60—Monthly Income to the Insured.**—If such disability shall occur before the Insured be sixty years of age and prior to the maturity of the Policy as an Endowment then the Company will, in addition to such waiver, pay to the Insured monthly as specified on the first page hereof, the sum of \$10 for each \$1,000 of the Face Amount of Insurance under the Policy. The first monthly payment shall be made six months after the Company shall have received such proof and subsequent payments shall be made on the first day of each month thereafter during such disability. Interest due on any undischarged under the

Such waiver of premiums and such monthly payment shall be additional to all other benefits and obligations under this Policy except as to Accidental Death Benefit and the Policy shall be continued in force and the Face Amount of Insurance, less any indebtedness, shall become due and payable at death or maturity in the same manner as if the Insured had actually continued to pay the premiums.

**Disability After Age 60 - Waiver of Premiums With Reduction of Face Amount of Insurance.**—If the disability of the Insured as defined above shall occur after the Insured is sixty years of age, the Company upon receipt of due proof of such disability will waive the payment of each premium that may become payable thereafter under this Policy during such disability, but the Face Amount of Insurance hereunder shall be reduced by the amount of each premium so waived, and any loan and non-forfeiture values shall thereafter be based upon the Face Amount of Insurance thus reduced.

**Recovery from Disability.**—The Insured, upon demand by the Company at any time during such disability and before the Company's liability hereunder has ceased, shall furnish due proof that he actually continues in a state of disability, as defined above, and in case of his failure so to do the Insured shall be deemed to have recovered from such state of disability.

In the event that the Insured recovers from such state of disability no further premiums shall be waived and no further monthly payments shall be made, and any insurance under the Policy, exclusive of the Accidental Death Benefit, at the time of such recovery shall be continued in force subject to the payment by the Insured of any premiums falling due thereafter.

**Extra Premium for Total and Permanent Disability Benefits.**—The Total and Permanent Disability Benefits are granted in consideration of the payment of an extra \_\_\_\_\_ annual premium of \$ \_\_\_\_\_, which is included in the amount of the premium stated on the first page hereof and which is payable at the same time and subject to the same provisions as to payment as the regular premium under this Policy; provided, however, that in no event shall said extra premium be payable on or after the anniversary of the Policy next succeeding the date when the Insured attains sixty years of age.

## LOAN PROVISIONS.

If this Policy be continued in force, no interest may borrow from the Company, without the consent of the Beneficiary, if any, named herein, with interest at the rate of six per cent. per annum, payable at the end of each policy year, on the sole security of this Policy, an amount up to the limit of the Cash Surrender Value of this Policy, or any portion thereof, from all other indebtedness on account of this Policy, by making written application for the loan and assigning the Policy to the Company, or any portion thereof, as the case may be, to the satisfaction of the Company. The Company may, at its option, require the insured to pay to the Company any such loan or loans, or any portion thereof, at the time of the next annual premium payment, or until one month after notice to the effect shall have been received by the Company at the last known address of the insured, of the person to whom the loan was made, not of the assignee of record at the Home Office of the Company, if any. The Company reserves the right to foreclose any loan, other than to pay premiums on policies in the Company, for a period not exceeding ninety days after application for such loan.

### NON-FORFEITURE PROVISIONS.

**POLICY NON-FORFEITABLE AFTER FIRST YEAR'S PREMIUM HAS BEEN PAID.**

**Non-forfeiture Value at End of First Policy Year.**—If this Policy after being in force one full year in its declared lapse for nonpayment of premium, the Company will continue to force the insurance under the Policy, excluding Disability and Accidental Death Benefits, for a period of six (6) days from the date the premium is received. If the premium is not received within the six (6) day period, the Policy will be terminated. If the premium is received within the six (6) day period of continued insurance, then on the first day of the second policy year, the Company will issue a new policy, which will be subject to the same policy terms and conditions as the original policy. If the premium is not received within the six (6) day period, the Policy will be terminated and the Company will not be liable for any benefits payable by the Company under this Policy up to the time of the death of the insured. If the Policy had been terminated for nonpayment of premium, the Company would not be liable for any benefits payable by the Company under this Policy.

**Cash Surrender Value.** If the Cash Surrender Value is paid to the Company within twelve months after the end of the second year (from its date or of any year thereafter), and if all premiums, except for the interest on the Policy, to the end of that year have been paid in full, the Company will pay the Cash Surrender Value by the following table, less any indebtedness to the Company on account of the Policy. The Company reserves the right to defer the payment of any Cash Surrender Value for a period not exceeding ninety days after application for such Cash Surrender Value.

[illegible][illegible]

The first instalment of the disability payments shall become payable three months after the company shall have received proof of disability. If the company shall not receive such proof within six months after the date of six months thereafter as specified in these disability provisions.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

B) *Forrest H. Snyder* President





**Cash Surrender Values Under Paid-up Endowment and Paid-up Term Policies.**—If this Policy shall lapse, as above, and a Paid-up Endowment Policy be issued or a Paid-up Term Policy be put in force in lieu thereof, such Paid-up Endowment or such Paid-up Term Policy may be surrendered at any time for its full reserve value at the time of such surrender. The Company reserves the right to defer the payment of any cash surrender value for a period not exceeding ninety days after application for such cash surrender value.

**TABLE OF LOAN AND NON-FORFEITURE VALUES.**  
(Values subject to reduction on account of any outstanding indebtedness as heretofore provided.)

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The Cash Surrender and Loan Values, Paid-up Endowment Policies and Pure Endowment stated in the following table apply to a policy of \$1000, Face Amount of Insurance. As the Face Amount of Insurance under this Policy is \$5000, the Cash Surrender and Loan Value (column 1), the Paid-up Endowment Policy (column 2) or the Pure Endowment (column 3) available in any year will be five times the amount stated in the table below for that year.

"At the end of"	(1) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(2) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(3) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance	"At the end of"	(1) Cash Surrender and Loan Values per \$1000 of Face Amount of Insurance	(2) Paid-up Endowment Policy per \$1000 of Face Amount of Insurance	(3) Automatic Extended Insurance for Face Amount of Insurance and Pure Endowment (Cash) per \$1000 of Face Amount of Insurance
1 Year	None	None	60 Days	11 Years	\$428 00	\$575 00	9 Years, \$526 00
2 Years	\$60 00	\$88 00	6 Years, 263 "	12 "	482 00	628 00	8 " 590 00
3 "	82 00	140 00	11 " 194 "	13 "	540 00	681 00	7 " 653 00
4 "	118 00	197 00	16 " \$16 00	14 "	601 00	734 00	6 " 714 00
5 "	160 00	258 00	16 " 104 00	15 "	665 00	787 00	5 " 774 00
6 "	198 00	311 00	14 " 179 00	16 "	726 00	832 00	4 " 823 00
7 "	239 00	363 00	13 " 252 00	17 "	790 00	875 00	3 " 870 00
8 "	282 00	416 00	12 " 323 00	18 "	857 00	918 00	2 " 918 00
9 "	328 00	469 00	11 " 392 00	19 "	927 00	959 00	1 " 959 00
10 "	376 00	522 00	10 " 460 00	20 "	1000 00	Policy Payable	

\*The tabular loan value at the end of any year, discounted at the rate of six per cent. per annum, shall be available to the Insured at any time after the entire premium for that year has been paid.

The non-forfeiture values in the above table are based upon the American Experience Table of Mortality with three and one-half per cent. interest per annum, and the net value of any such non-forfeiture value, from the second to the end of the fifteenth year, is at least equal to the entire reserve on this Policy, according to the foregoing standard, less a percentage (not more than two and one-half) of the Face Amount of Insurance under the Policy; thereafter, such tabular value is the full reserve by said standard, less a surrender charge, if made, of not more than one-tenth of one per cent. of the Face Amount of Insurance under the Policy.

If the Face Amount of Insurance be increased by dividend additions the Loan and Cash Surrender Values will be increased by the full reserve on account of such additions and the other non-forfeiture values modified accordingly.

If the premiums on this Policy be paid in quarterly or semi-annual instalments, due allowance will be made in computing values from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated; provided, however, that if more than one but less than two full years' premiums shall have been paid an allowance of fifteen days of continued insurance will be made for each quarter of a year for which the premium has been paid.

**PROVISIONS AS TO MODES OF SETTLEMENT AT MATURITY.**

The Insured may at any time while this Policy is in force, subject to the rights of any assignee and with the power of revocation, by written notice to the Company, designate any one of the following options as the manner in which the amount of insurance shall be payable in lieu of being paid in one sum, and the Company will then endorse on the Policy that payment shall be made according to the option designated, but if the Insured shall have made no such designation, the Beneficiary shall have the right of designation; provided, however, that in no event shall Option 1 or 2 be available to an individual Beneficiary if the amount of each instalment payable thereunder to such Beneficiary would be less than \$10, nor shall Option 3 be available if the amount of insurance payable be less than \$1,000 and none Insured shall designate one of the following options as the mode of settlement, the provisions of such option shall be construed as applying to the Insured in the same manner as they would have applied to the Beneficiary if the Policy had matured by death.

**Option 1. Monthly Instalments for Definite Number of Years.**—The amount of insurance or a part thereof to be payable in equal monthly instalments, each instalment of the amount stated for the definite number of years selected, together with dividends, if any, according to the following table:

Number of Years During Which Monthly Instalments Are Paid	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of Monthly Instalment Per \$1,000 of Insurance	\$42.85	\$28.90	\$22.03	\$17.95	\$15.20	\$13.25	\$11.78	\$10.64	\$9.74	\$9.00	\$8.39	\$7.87	\$7.42	\$7.05	\$6.69	\$6.40	\$6.14	\$5.91	\$5.70	\$5.51	\$5.34	\$5.18	\$5.04	\$4.92

**Option 2. Monthly Instalments for Definite Number of Years and Continuously Thereafter.**—The amount of insurance or a part thereof to be payable in equal monthly instalments, each instalment of the amount stated for the age of the Beneficiary at the death of the Insured, together with dividends, if any, and payable during the definite number of years selected, and thereafter so long as the Beneficiary shall live, as specified in the following table:

AMOUNT OF MONTHLY INSTALMENT PER \$1,000 OF  INSURANCE PAYABLE DURING YEARS STATED AND THEREAFTER DURING LIFETIME OF THE BENEFICIARY	DEFINITE	AGE OF BENEFICIARY WHEN POLICY BEGINS A CLAIM																											
	NUMBER OF YEARS	16 and Under	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38					
5 Years	\$3.91	\$3.94	\$3.96	\$3.98	\$4.00	\$4.03	\$4.06	\$4.08	\$4.11	\$4.11	\$4.16	\$4.21	\$4.25	\$4.28	\$4.32	\$4.36	\$4.41	\$4.45	\$4.50	\$4.55	\$4.61	\$4.67	\$4.73	\$4.79					
10 Years	\$3.87	\$3.90	\$3.91	\$3.93	\$3.95	\$3.98	\$4.00	\$4.03	\$4.06	\$4.09	\$4.12	\$4.15	\$4.19	\$4.22	\$4.26	\$4.30	\$4.34	\$4.38	\$4.43	\$4.48	\$4.53	\$4.59	\$4.64	\$4.70					
15 Years	\$3.81	\$3.83	\$3.85	\$3.87	\$3.89	\$3.91	\$3.94	\$3.96	\$3.99	\$4.02	\$4.05	\$4.08	\$4.11	\$4.14	\$4.18	\$4.21	\$4.25	\$4.29	\$4.34	\$4.39	\$4.44	\$4.49	\$4.54	\$4.60					
20 Years	\$3.74	\$3.76	\$3.78	\$3.80	\$3.82	\$3.84	\$3.87	\$3.89	\$3.91	\$3.94	\$3.97	\$3.99	\$4.02	\$4.05	\$4.09	\$4.12	\$4.15	\$4.19	\$4.23	\$4.27	\$4.31	\$4.36	\$4.41	\$4.46					

AMOUNT OF MONTHLY INSTALLMENT PER \$1,000 OF INSURANCE, PAYABLE DURING YEARS STATED AND THEREAFTER DURING LIFETIME OF THE BENEFICIARY	DEFINITE NUMBER OF YEARS	AGE OF BENEFICIARY WHEN POLICY BEGINS TO CLAIM																											
	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	\$1 and over						
	5 Years	\$4.79	\$4.86	\$4.94	\$5.01	\$5.10	\$5.18	\$5.26	\$5.37	\$5.48	\$5.59	\$5.71	\$5.84	\$5.97	\$6.11	\$6.27	\$6.43	\$6.60	\$6.78	\$6.97	\$7.18	\$7.40	\$7.63	\$7.87					
	10 Years	\$4.70	\$4.77	\$4.84	\$4.91	\$4.98	\$5.06	\$5.15	\$5.24	\$5.33	\$5.43	\$5.53	\$5.64	\$5.75	\$5.87	\$6.00	\$6.15	\$6.30	\$6.46	\$6.63	\$6.80	\$6.98	\$7.16	\$7.34					
	15 Years	\$4.58	\$4.64	\$4.70	\$4.76	\$4.82	\$4.90	\$4.97	\$5.04	\$5.12	\$5.20	\$5.28	\$5.36	\$5.45	\$5.53	\$5.62	\$5.71	\$5.81	\$5.90	\$6.00	\$6.10	\$6.20	\$6.30	\$6.40	\$6.50	\$6.60	\$6.70	\$6.80	
20 Years	\$4.44	\$4.49	\$4.54	\$4.59	\$4.64	\$4.70	\$4.75	\$4.80	\$4.86	\$4.92	\$4.97	\$5.03	\$5.09	\$5.14	\$5.20	\$5.25	\$5.30	\$5.35	\$5.40	\$5.45	\$5.50	\$5.55	\$5.60	\$5.65	\$5.70	\$5.75	\$5.80		

**Option 3. Trust Fund.**—The amount of insurance or any portion thereof not less than \$1,000 to be left during the lifetime of the Beneficiary in trust with the Company, and the Company will pay thereon, so long as the said amount or said portion thereof remains with the Company, interest at the rate of three and one-half per cent. per annum, together with dividends, if any. The said Trust Fund shall be paid at the death of the Beneficiary to the executors or administrators of the Beneficiary.

**Annual, Semi-Annual or Quarterly Instalments.**—computed at the rate of three and one-half per cent. per annum compound interest, will be paid upon request in lieu of the monthly instalments provided under Options 1 and 2, unless the Insured shall have otherwise directed in writing.

**Unpaid Instalments at Death of Beneficiary.**—If one or more instalments shall actually be paid in accordance with the provisions above and if the Beneficiary shall die before all instalments payable shall have been paid, and if there be no contingent beneficiary designated by the Insured or by the Beneficiary after the death of the Insured, the unpaid instalments will be computed at the rate of three and one-half per cent. per annum compound interest and paid in one sum to the executors or administrators of the Beneficiary.

**Dividends with Instalments or Interest.**—If the amount of insurance be payable in instalments, monthly or otherwise, or be left in trust with the Company, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will effect an increase in the instalments or in the interest payable on account of the trust fund, but no dividend will be declared on instalments payable after the period fixed for instalments certain.





Received MAY 8 - 2.30

MEDICAL DEPARTMENT

APPROVED

MAY 10, 1922

By *[Signature]*

REFERRED TO MED. DEPT.

BY LAY APPR *[Signature]*

Med. Exr O.K.

N.R.

sent

M.I.B.

Ex Post Memorandum

ORDINARY ISSUE DEPARTMENT

ACCEPTED SUBJECT TO  
CONDITIONS OF APPLICATION

MAY 12 1922

Inspection

Ordered

MAY 8 1922 H.F.L.

Details to be adjusted

Age 28

Reviewed, hold for

R.M.

Med. Corres *[Signature]*Dist. Corres *[Signature]*

MAY 8 - 2.30 TO BE FILLED IN BY MANAGER OR DETACHED SPECIAL AGENT. QUESTIONS ON REVERSE SIDE APPLICABLE TO CASE MUST BE ANSWERED.

Give date on which examination was received

Are there any other agents or brokers  
(noted in this application?)  
(If yes, give name or names)

No

Give applicant's

Who secured the

application below?

HAWAIIAN TRUST CO., LTD.

(Print of name) FULL name

Sam L. Alina employee

Manager

APPLICATION FOR  
INSURANCE IN

The Prudential Insurance Company of America,

Home Office, Newark, New Jersey

Incorporated under the laws of the State of New Jersey

Located at Honolulu T. H.

NUMBER

3955636

1 What is your FULL name? (Please print.)		YUEN TAI KAM	
2 What is your present occupation or occupations? Explain exact duties.		Aest. Manager, Fong Inn Co.	
3 Do you intend changing your present occupation? If yes, state particulars.		No	
4 Are you now or have you any intention of becoming connected with the military or naval service, either regular or reserve? If so, give particulars.		No	
5 Are you engaged in or have you any intention of engaging directly or indirectly in aviation or submarine work?		No	
6 Do you intend living or traveling in Alaska or in any other possessions of the United States, or in any country except the United States or Canada? If yes, state particulars.		No	
7a Are you now insured in this or any other company or association? Give full particulars. If in this Company, give policy numbers also, including Industrial policies, if any.			
Name of Company	Amount	Kind of Policy	Policy Number if in this Company
None			
7b Indicate if the policies in other companies are Double Indemnity or Disability Income policies.			
7c If you now have health insurance protection, state total amount of benefits per week so provided.			
8 Where were you born?	9 When were you born?	10 Age nearest birthday?	11 Are you married?
China (State or Country.)	Month: June Day: 12th Year: 1894	28	Yes
12 What kind of policy is desired? (Use such terms as Whole Life, 20-Year Endowment, etc., and if desired, describe briefly or describe in detail.)			
20 Year Endowment with A. D. B.			
13 To whom is this insurance to be payable at your death? (Full name.)			
CHUN NGIT NGAN			
Age of Beneficiary		Relationship to Applicant	
23		Wife	
Present residence		Same	
22 AMOUNT OF INSURANCE		23 Is premium to be paid annually, semi-annually or quarterly?	
\$5000.		Annually	
24a What amount have you paid in advance on account?		24b Is this equal to the full first premium? Answer yes or no.	
\$None		Yes.	
25 Do you wish the privilege of changing the beneficiary? Answer yes or no.			
Yes.			

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I swear that the foregoing, together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examining, contract of insurance hereby applied for. I further agree that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained and become a part of the full first premium is paid by me at the time of making this application, the policy shall not take effect until issued by the Company and received by me and the full first premium thereon is paid, while my health, habits and occupation are the same as described in this application. It is understood and agreed, however, that if at the time of signing this application the full first premium is paid, the insurance shall take effect from the date of this application, in accordance with the provisions of the policy hereby applied for, provided this application is approved and accepted at the Home Office of the Company, in Newark, New Jersey, under the plan, for the premium paid and amount of insurance applied for.

Witness to Applicant's signature: Sam L. Alina } Full signature of the person whose life is to be insured { Yuen Tai Kam

Dated at Honolulu this 20th day of March, 1922.

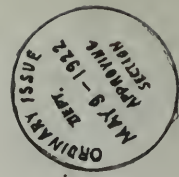
OND 8009-REV 1-15-21

Clerk's Note:  
For page 74, see back hereof.

73

73

73



*Robert D. Smith*  
Filed in the Supreme Court  
June 23, 1922 at 3:40 o'clock P.M.  
of 1922

*Wm. H. Smith*  
1922  
EXHIBIT  
NO. 10307

QUESTIONS TO BE ANSWERED BY THE AGENT IF APPLICANT WAS BORN OUTSIDE OF THE UNITED STATES OR CANADA.

1 How long has applicant been in the United States or Canada? <i>15 Years</i>	3 Can he speak English so as to be readily understood? <i>Yes</i>	Armenian...	Hebrew...	Magyar...	Rumanian...	Slovak...
2 Can he read or write? In what language? <i>Yes English &amp; Chinese</i>	4 Does a check opposite the nationality of the applicant. If not in table, state same here. <i>Chinese</i>	Bohemian...	Slav etc. etc. where born	Polish...	Russian...	Syrian...
		Greek...	Lithuanian...	Portuguese...	Servian...	Turkish...

QUESTIONS TO BE ANSWERED BY THE AGENT IF THE APPLICANT IS A WOMAN

1 With whom does applicant reside?	2 If husband is living, for what amount is he insured in his wife's name? If in this Company give number of policy	3 What is husband's name, and occupation?
4 State names and ages of living children.	5 From what source does applicant derive means of support?	6 Who is dependent on applicant for support?
		7 Does applicant reside in a house or building where intoxicating liquors are sold?

AGENT'S GENERAL REPORT. (REQUIRED WITH EVERY APPLICATION.)

The Company desires to emphasize the importance of the Agent's General Report, which must be made by the writer of the application, who will be held PERSONALLY RESPONSIBLE for the accuracy of the information given. The statements contained therein should be based on facts obtained after careful and thorough investigation.

1 How long have you known the applicant? <i>10 years</i>	2 Are the home surroundings healthful and such as to warrant the amount of insurance applied for? <i>Yes</i>	3 If the applicant is a minor, state parent names and occupations. <i>✓</i>	4 After personal investigation do you find applicant has been and is of temperate habits and good moral character? <i>Yes</i>	5 Who is to pay the premiums? <i>Applicant</i>
6 For what rating is the applicant eligible under the Company's rules as to occupation, height and weight etc? <i>No rating</i>	7 Is any ordinary or industrial insurance in this or any other company or with the New York Bureau to be discontinued if policy now applied for is issued? Give full particulars. <i>No.</i>	8 Does applicant appear to be in good health? <i>Yes</i>	9 Do you recommend the risk to the Company and advise the issue of the policy applied for? <i>Yes.</i>	
10 What is the purpose of the insurance applied for? <i>(family protection, business insurance, inheritance tax, etc.)</i>				

I hereby certify that the above report is the result of a personal investigation by me and I hereby vouch for the reliability of the information given.  
HAWAIIAN TRUST CO. LTD.  
..... *James S. Mull Jr.* ..... Title

BEFORE HANDING APPLICATION TO THE MEDICAL EXAMINER, BE SURE THAT ALL QUESTIONS IN THE APPLICATION AND AGENT'S REPORT ARE PROPERLY ANSWERED. CHANGES, CORRECTIONS OR ERASURES SHOULD BE INITIALED BY THE APPLICANT.





# DETAILS OF ILLNESSES RECORDED ON THE REVERSE SIDE

Illness

Duration

Severity

Consultations

Sequelae

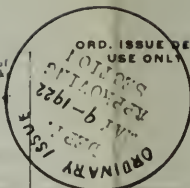
Date of Complete Recovery

No. of Attacks

APPROVED

MAY 10 1922

BY *[Signature]*



MEDICAL DEPT. USE ONLY

Additional REMARKS:

CREDIT \$5.00

MAY 8 1922

NG

\$5.00 fees

ORD 72

*L. N. 10307*  
INDEPENDENT'S  
FILE

*May 2, 1924*  
*William H. Parker*  
CLERK

MAY 8 - 2.30

*No. 1556*

Rec'd & Filed in the Supreme Court

*June 29, 1924* A.D. 1924 P. M.

*Robert Parker Jr.*  
Assistant Clerk

*16X*

DEFENDANT'S EXHIBIT No. 3.

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant.

STIPULATION RE TESTIMONY OF DR. IGA  
MORI AND NOTICE OF DECISION ON  
ERROR.

IT IS HEREBY STIPULATED by and between the parties hereto that Dr. Iga Mori would, if present upon the trial of this case, testify as a witness on behalf of the defendant as follows:

That he is a physician duly licensed to practice in the Territory of Hawaii and that as such licensed physician he treated Mr. Yuen Tai Kan, a Chinese merchant, for neurasthenia and hemoptysis (spitting of blood) from January 21st, 1922, to May 22d, 1922, and that prior to said dates the said Yuen Tai Kan had been going to said Iga Mori for treatment for several years.

Dated, Honolulu, April 14, 1924.

THOMPSON, CATHCART & BEEBE,  
Attorneys for Plaintiff.

FREAR, PROSSER, ANDERSON &  
MARX,

M. F. P.,  
Attorneys for Defendant. [77]

No. 1556. In the Supreme Court of the Territory of Hawaii. October Term, 1923. Error. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Notice of Decision on Error. Filed January 12, 1925, at 3:35 o'clock P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangewald Building, Honolulu, T. H., Attorneys for Plaintiff in Error. Thompson, Cathcart & Beebe, 2—13 Campbell Block, Honolulu, T. H., Attorneys for Defendant in Error. [78]

No. 1556.

In the Supreme Court of the Territory of Hawaii.  
October Term, 1923.

ERROR.

CHUN NGIT NGAN,  
Plaintiff and Defendant in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant and Plaintiff in Error.

NOTICE OF DECISION ON ERROR.

To the Honorable Third Judge of the Circuit Court  
of the First Judicial Circuit, Territory of  
Hawaii:

You will please to take notice that in the above-entitled cause the Supreme Court has filed the following decision on error:

DECISION ON ERROR.

In the above-entitled cause, pursuant to an opinion of the above-entitled court filed on the 11th day of December, 1924, the court ordered that the judgment theretofore entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of the plaintiff and against the defendant, be set aside and a new trial granted.



Dated at Honolulu, T. H., January 12, 1925.

By the Court:

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of  
Hawaii.

Dated at Honolulu, T. H., January 12, 1925.

By the Court:

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of  
Hawaii. [79]

The foregoing notice is hereby approved as to  
the form thereof, and it is ordered that the same  
issue forthwith.

Dated Honolulu, T. H., January 12, 1925.

[Seal]

A. PERRY,

Associate Justice of the Supreme Court of the Ter-  
ritory of Hawaii.

### CERTIFICATE.

Territory of Hawaii,

City and County of Honolulu,—ss.

I, J. A. Thompson, Clerk of the Supreme Court  
of the Territory of Hawaii, do hereby certify that  
the foregoing document, and attached hereto, is a  
full, true and correct copy of the original notice of  
decision on error which is now on file in the office  
of the Clerk of the Supreme Court in the foregoing  
entitled cause, Numbered 1556.

WITNESS my hand and the seal of the Supreme  
Court of the Territory of Hawaii, at Honolulu,



City and County of Honolulu, this 12th day of January, A. D. 1925.

J. A. THOMPSON,  
Clerk Supreme Court, Territory of Hawaii.

[Endorsed]: Law Number 10307. Supreme Court, Territory of Hawaii. Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant. Certified Copy of Notice of Decision on Error from the Supreme Court. Filed at 4 o'clock, P. M., Jan. 12, 1925. Sibyl Davis, Clerk. [80]

[Endorsed]: L.—No. 10307. Reg. 9, pg. 282. Circuit Court, First Circuit, Territory of Hawaii. Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant. 39/197. L.—No. 10307. Defendant's Exhibit 3. Filed May 2, 1924. William Hoopai, Clerk.

Stipulation and Supreme Court Remittitur. Filed April 15, 1924, at 4 P. M. B. N. Kahalepuna, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangewald Building, Honolulu, Attorneys for Defendant.

No. 1556. Rec'd and Filed in the Supreme Court, June 23, 1924, 3:10 o'clock, P. M. Robert Parker, Jr., Assistant Clerk. [81]

## DEFENDANT'S EXHIBIT No. 4.

In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant.

STIPULATION RE TESTIMONY OF DR. ED.  
DE MEGLIO AS A WITNESS ON BEHALF  
OF THE DEFENDANT.

IT IS HEREBY STIPULATED by and between the parties hereto that if Dr. Ed. De Meglio were called as a witness on behalf of the defendant in the above-entitled cause he would testify as follows:

That he knew deceased, Yuen Tai Kam, and he was under his professional care for a few weeks prior to December 7, 1921. At that time the said Yuen Tai Kam suffered periodical hemorrhages from his bucal cavity, which he and several doctors attributed to be from his lungs.

Any pulmonary bleeding is a symptom of advanced tuberculosis and is always accompanied by a severe cough; I found no cough present, so, by means of a long laryngal applicator, took some smear from his bronchus, and had it examined, also took some of the blood, both showed no tuberculosis whatever, only a mixed infection, mostly Streptococci. After a

thorough examination of his Nasopharynx, found the bleeding-point on the posterior end of the lower turbinate consisting of an ulcer over a varicose [82] blood vessel. The blood examination showed him to be slightly hemophilic and the nasal infection, to be from his right frontal sinus. I removed the middle turbinate, to provide free drainage and injected subcutaneously over his chest, 10 cc of Thromboplastin every other day, 4 times. All the bleeding has stopped so far. If he should show *an* trace of it again, would advise you to give him Elixier chlorocalcium with Ergotol combined, 4 times daily. Otherwise I would like you to give him Hypodermically on his return, the Galen-Tonic which I send, every other day, alternating No. 1 and 28. After that, let him take the Bland mass pills I send until used up. I would appreciate greatly, to hear from you in regard to his case, from time to time, and remain your fraternally.

That the said Dr. De Meglio is a physician legally qualified to practice his profession within the State of Oklahoma and the City of Oklahoma, and that the foregoing statement was contained in a letter by him directed to Dr. Chung of Honolulu, which said letter was dated December 7, 1921. This stipulation is entered into without waiving any objection as to relevancy or materiality of the foregoing.

Dated, Honolulu, January 3, 1924.

THOMPSON, CATHCART & BEEBE,

Per E. H. BEEBE,

Attorneys for Plaintiff. [83]

[Endorsed]: L.—No. 10307. Reg. 9, pg. 282. Circuit Court, First Circuit, Territory of Hawaii. Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant. First of 1924 Files. Stipulation Re Testimony of Dr. Ed. De Meglio as a Witness on Behalf of the Defendant.

L.—No. 10307. Defendant's Exhibit 4. Filed May 2, 1924. William Hoopai, Clerk.

Filed January 21, 1924, at 10:30 A. M. B. N. Kahalepuna, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangewald Building, Honolulu, Attorneys for Defendant.

No. 1556. Rec'd and Filed in the Supreme Court, June 23, 1924. At 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [84]

#### DEFENDANT'S EXHIBIT No. 5.

[Cablegram.]

Received 8.20 A. M. Subject to Terms and Conditions at Back Hereof, Which Are Ratified and Agreed to.

(Apr. 4, 1923.)

Rec'd Apr. 4, 1923.

8:20 A. M.

G HU 2 NEWARK NJ 19

M. A.

Trust Co. Honolulu.

Kam claim rejected Make legal tender before witness of premium to wife Obtain policy and release.

PRUDENTIAL.

No inquiry respecting this Message can be attended to without the production of this paper. Repetitions of doubtful words should be obtained through the Company's offices, and not by applying directly to the sender.

L.—No. 10307. Defendant's Exhibit 5. Filed May 2, 1924. William Hoopai, Clerk. [85]

COMMERCIAL PACIFIC CABLE COMPANY.  
San Francisco .... Postal Telegraph-Cable Offices.  
Honolulu .....3 Alexander Young Building  
Midway Islands ..... Sand Island  
Guam ..... Soumaye  
Manila .....El Hogar Filipino  
Shanghai ..... 7 The Bund  
Commercial Cable and Postal Telegraph Companies.  
In the United States.

### TERMS AND CONDITIONS

The Company may decline to forward the Message, though it has been received for transmission; but in case of so doing, shall refund to the sender the amount paid for the transmission of the Message. The Company will refund to the sender the charges paid by him—

- (a) For any telegram which fails to reach the Addressee through any neglect or fault of the Company or its servants, whilst the Message remains under the control of the Company.
- (b) For any repeated telegram which, owing to errors made in transmission by the Company's servants, has manifestly not fulfilled its object.

- (c) For every telegram in plain language which has manifestly been unable to fulfill its object, in consequence of errors made in its transmission, unless the errors have been rectified by paid service advice.

Whatever may be the damage caused either by errors, mistakes, delays, mis-delivery, non-delivery, or otherwise, in respect of any Message entrusted to the Company for transmission, and whether the same arise from the neglect or the fault of the Company's servants, or howsoever otherwise the same may arise, the Company shall not be liable except to refund to the sender in the cases above mentioned the amount paid to the Company for the transmission of the Message.

The control of the Company over the Message shall be deemed to have entirely ceased at any point where in the course of the transit of the Message to its destination, it may be entrusted by the Company (and the Company shall have full powers so to entrust the Message) for further transmission to any other system, service, or line of telegraph.

CLARENCE H. MacKAY,

President.

GEO. G. WARD,

Vice-Pres't and Gen'l Manager.

Rec'd and filed in the Supreme Court June 23, 1924, at 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [86]





## THE PRUDENTIAL INSURANCE CO. OF AMERICA

Incorporated under the laws of the State of New Jersey  
*Forrest E. Dwyer*, President HOME OFFICE, NEWARK, N. J.

(BEFORE COMPLETING THIS STATEMENT, READ THE INSTRUCTIONS ON THE REVERSE SIDE)

1 No. of Policy <u>39556636</u> Amount, \$ <u>5000.00</u>	No. of Policy <u>1923</u> Amount, \$ <u>Amount</u>
No. of Policy _____ Amount, \$ _____	No. of Policy <u>APR 5</u> Amount, \$ _____
No. of Policy _____ Amount, \$ _____	No. of Policy _____ Amount, \$ _____

2 Full name of deceased. Yuen Tai Kam3 Date of death. February 5th 1923.4 Legal residence at time of death. 1709-H Center Drive, Honolulu, T. H.5 Insured's occupation. Asst. Manager, Fong Inn Co.6 Insured's date of birth. Month June Day 12th Year 1894.

7 State source from which date of birth was obtained.

(Family record, certificate of birth or other records should be referred to.) Certificate of Identity from U.S. Immigration8 Have any proceedings under any bankruptcy law ever been instituted by or against the insured, or has insured made any assignment or executed any deed for the benefit of creditors? No9 What other insurance was in force on the life? (Give name of Company and amount of insurance.) None10 How many children survive the insured, and what are their ages? None.11 Are you related to the insured, and how? Yes, wife12 What is the date of your birth? June 3rd 1898

The person executing this statement represents to The Prudential Insurance Company of America that no proceedings under any bankruptcy law have ever been instituted by or against him (or her) nor has he (or she) at any time made any assignment or executed any deed for the benefit of creditors.

Dated February 7th 1923Signature Chun Ngit NganWitness Sam L. AlinaPost-office address 1709-H Centre Drive Honolulu, T.H.

Affidavit not required if claimant statement, with affidavit, must be so:

1 By what right or title do you make claim

2 If assignee, why and for what was the pc

3 What is the amount of the insured's inde

4 What amount do you claim by reason of

State of \_\_\_\_\_

County of \_\_\_\_\_

On this \_\_\_\_\_

who subscribed the foregoing statement and

## YOUNG MERCHANT DIES



YUEN KAM.

## YUEN KAM, WIDELY KNOWN CHINESE, DIES AFTER LONG ILLNESS

Yuen Kam, one of the most prominent young Chinese of Honolulu, died early this morning after an illness of several months. He was assistant manager and a copartner in the well-known firm of the Fong Inn Co., being a nephew of Mr. Fong Inn. He is survived by the young widow. Several brothers and sisters and his father live in China.

Yuen Kam was born in China and came to Honolulu about 15 years ago and rapidly rose to a position of influence in the community. He made several buying trips to China for the Fong Inn Co.

The body may be viewed by friends from 6 o'clock this evening until 1 o'clock tomorrow afternoon at Silva's undertaking rooms. The funeral will be held tomorrow afternoon from the Second Chinese Congregational church on Beretania street.

(Reprinted from The Honolulu Star-Bulletin of February 5, 1923.)

nt is other than these, the following

y appeared before me the above named

## INSTRUCTIONS

A separate **Claimant's Statement** must be made by each claimant. Affidavit not required if claimant is beneficiary (or guardian thereof), administrator or executor.

When the insurance is payable to a beneficiary of full age, this statement must be completed by such beneficiary.

If the beneficiary is a minor, this statement must be completed by a guardian, and a certified copy of letters of guardianship furnished.

\* If the policy is payable to the insured's estate, this certificate must be executed by the administrator or executor, who must furnish an official certificate of appointment.

If the policy has been assigned, this statement must be completed by the assignee, who must submit the original assignment or a certified copy of it.

If the beneficiary named in the policy is dead, evidence of death must be submitted (official transcript of death or a sworn statement of last attending physician.)

**The Attending Physician's Statement** must be completed by the doctor in attendance during last illness of the insured, and sworn to before an officer duly authorized to administer oath, who should imprint his seal thereon and state the date of expiration of his commission; or if he has no seal, his authority and the genuineness of his signature must be attested by the proper official.

When a coroner's inquest has been held, a certified copy of the verdict must be furnished as a part of the proof of death.

**The Identity Statement** must be made by some person of legal age, well acquainted with, but not related to, the insured, who has seen the remains and is not interested in the insurance.

**The Undertaker's Certificate** must be completed unless the remains were viewed and identified by a representative of the Company.

If the total amount of insurance in this Company exceeds \$1,000, the identity and undertaker's certificates must be sworn to before an officer duly authorized to administer oath, who should imprint his seal thereon and state the date of expiration of his commission; or if he has no seal, his authority and the genuineness of his signature must be attested by the proper official.

The employment of a third person for the collection of a valid claim due from this Company is unnecessary and a needless expense.

No person acting on behalf of the Company is permitted to demand or receive any compensation for notarial or other services in preparing the proofs of death. The claimant, however, is expected to pay the fees of officials, who are not representatives of the Company, for administering oaths in connection with the several statements constituting proofs of death and the expense of attest certificates, if any is required.

All claims are due and payable immediately upon receipt of satisfactory proof of death, and correspondence and attendant delay will be avoided if interested parties will see that the foregoing requirements are strictly complied with and that the answers to all the questions are written clearly and in full.

The Company reserves the right to require or obtain such additional evidence of death as may seem necessary.

## MODES OF SETTLEMENT

**Ordinary Policies.**—The whole amount payable or a portion thereof may be taken in equal monthly instalments for a definite number of years. Or, the whole amount payable or a portion thereof may be taken in equal monthly instalments payable during a definite number of years selected, and thereafter as long as the beneficiary may live, as per schedule below.

### MONTHLY INSTALMENTS PER \$1000 OF INSURANCE

MONTHLY INSTALMENTS FOR DEFINITE NUMBER  
OF YEARS    Number of Years—Amount of  
Each Instalment per \$1000

CONTINUOUS MONTHLY INSTALMENTS  
Amount of Each Instalment per \$1000

*Insured's name's Description here*

*Insured's name's Description here*

Or, the instalment payments may be taken in quarterly, semi-annual or annual payments, and the exact amount of the instalments will be furnished upon application to the Company.

**Intermediate Policies.**—The amount payable may be taken in 24 equal monthly instalments of \$21.28 per \$500 of insurance. Or, may be taken in 52 equal weekly instalments of \$9.68 per \$500 of insurance payable.

**Ordinary and Intermediate Policies.**—If one or more instalments under an Ordinary or Intermediate policy shall actually be paid in accordance with the provisions of any of the options above, and the beneficiary shall die before the remaining instalments shall have been paid, and there be no contingent beneficiary designated, the unpaid instalments will be commuted at the rate of 3½ per cent. per annum compound interest, and paid in one sum to the executors or administrators of the person to whom the instalments are payable.

If the amount of insurance be payable in instalments, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will effect an increase in the instalments, but no dividend will be declared on instalments payable after the period fixed for instalments certain.

At the maturity of a regular Ordinary policy, the amount payable or any portion thereof, if not less than \$1,000, may be left in trust with the Company. This trust fund privilege does not form a part of Intermediate policies but will be allowed, provided the aggregate amount payable to one beneficiary under Intermediate or Ordinary policies, or both combined, is, at least, \$1,000. Interest at the rate of 3½ per cent. per annum, together with any dividends apportioned to the fund, will be paid. At the death of the owner, the fund will be paid to the executors or administrators of that person.

The above-mentioned options are not available if the beneficiary be a corporation or firm, nor will monthly instalments be paid if the amount of each instalment be less than \$10.



# THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

Incorporated under the laws of the State of New Jersey

FORREST F. DRYDEN, President

HOME OFFICE, NEWARK, NEW JERSEY

## ATTENDING PHYSICIAN'S STATEMENT

This certificate must be filled in by the physician in his own handwriting.

1 Full name of deceased—insured.	Y u e n   T a i   K a m
2 Date of Death.	Feb. 5, 1923.
3 Married or single?	Married
4 Place of death (give street, number, city or town, and state).	Leahi Home, Honolulu, T. H.
5 What have been insured's several occupations?	Bookkeeper. Ass't Manager of Fong Inn Co.
6 Correct age at death.	28 yrs on June 12th 1922 -
7 How long had you known insured?	Since Oct. 21, 1922.
8 How long had you been the medical attendant or adviser of insured?	From Oct. 21, 1922 to Feb. 5, 1923.
9 Were you consulted or did you give treatment for any important ailment prior to last illness? If so, give dates and particulars of disease.	No.
10 When were you first consulted regarding the impairment of health which, directly or indirectly, caused death?	Oct. 21, 1922.
11 At the time you were first consulted, how far advanced was the disease causing death and what was its duration?	Far advanced - Both lungs being seriously involved.
12 From history obtained give the date of inception of the disease that caused death.	June ? , 1922
13 Date of last treatment.	Feb. 5, 1923.
14 Did you see body of deceased?	Yes
15 State explicitly the immediate cause of death.	Tuberculosis Pulmonalis
16 State the contributing causes of death.	Emaciation, general weakness, - Cardiac & otheru
17 If death was due to accident, suicide or homicide, please state method.	-
18 Was death caused, directly or indirectly, by intemperance or any pernicious habit?	no
19 Did deceased have consumption?	Yes
20 Had any other physician been consulted before you or was any associated with you during the last illness? If so, give names and addresses.	Yes - Dr. A. V. Sinclair - Emma St, Honolulu Dr. F. K. Lam - McCandless Bldg. r 1 & 3
21 Was there a post-mortem examination?	no
22 Was there a coroner's inquest held?	no
23 State fully and particularly any other facts or circumstances within your knowledge bearing on the case. (If more space is needed for reply, use reverse side.)	Patient stated that he had been troubled with bronchitis (?) some little before he really became seriously ill.
24 When and where did you receive your medical diploma?	College of Phys. & Surgeons, Univ. of So. Calif. Los Angeles June 19, 1919.
25 How long have you been engaged in practice?	Since June 19, 1919.

Signed C. A. Saunders, M. D.

Office address Leahi Home

(Street and Number)

Honolulu, T. H.

(City or Town and State)

Terr. of Hawaii.

City Honolulu } ss.:  
&  
County of Honolulu

On this 10 th day of February, 1923,

named Dr. C. A. Saunders, who subscribed the foregoing statement before me and made oath that the foregoing answers are each and all true.

(SEAL) Robert Syers Anderson  
Notary Public, 1st Judicial Circuit, Terr. of Hawaii.

This statement must be sworn to before an officer authorized by law to administer oaths, who must affix his seal and give the date of expiration of his commission. If the official has no seal, his authority and the genuineness of his signature must be attested by the clerk of the court of record.

Clerk's Note:  
See, back hereof for endorsement.





DEFENDANT'S EXHIBIT No. 7.

III.

That subsequent to the death of Yuen Tai Kan, named as the insured in said policy of insurance, on the 7th day of April 1922 and prior to the expiration of one year from the date thereof, defendant notified Chun Ngit Ngan named in said policy as beneficiary thereunder, that it refused to recognize said policy as valid because of false and erroneous statements made by the insured upon his examination by the medical examiner for defendant, prior to the issuance of said policy and did then and there tender to said Chun Ngit Ngan the entire sum theretofore paid as premiums under said policy, which tender was refused by the said Chun Ngit Ngan and did demand a return of said policy by said Chun Ngit Ngan to the defendant.

L.—No. 10307. Defendant's Exhibit 7. Filed May 5, 1924. William Hoopai, Clerk.

No. 1556. Rec'd and filed in the Supreme Court June 23, 1924, at 3:10 o'clock P. M. Robert Parker, Jr., Assistant Clerk. [90]



[Title of Cause.]

### ORDER FIXING TIME OF TRIAL.

Monday, April 21, 1924, 2 P. M.

E. H. BEEBE, Esq. (T. C. B.), Attorney for Plaintiff.

A. E. STEADMAN, Esq. (F. P. A. M.), Attorney for Defense.

By agreement of respective counsel the above-entitled cause is set for trial at 2 o'clock P. M., May 2, 1924.

### AFTERNOON SESSION—2 o'clock P. M.

Present: Hon. JAS. J. BANKS and Third Judge Presiding.

WILLIAM HOOPAI, Clerk.

J. L. HORNER, Reporter.

[Title of Cause.]

### TRIAL.

Trial Jury Waived.

E. A. BEEBE, Esq. (T. C. B.), Attorney for Plaintiff.

SANFORD B. D. DOLE, Esq. (T. C. B.), Attorney for Plaintiff.

F. M. PROSSER, Esq., (F. P. A. M.), Attorney for Defendant.

A. E. STEADMAN, Esq. (F. P. A. M.), Attorney for Defendant.

Both parties being ready to proceed with trial in the above-entitled cause, Mr. *BeBee* after making

statement to the Court offered in evidence Insurance Policy of Yuen Tai Kam for \$5,000.00 and by order of the Court was received and marked Plaintiff's Exhibit "A."

At 2:10 P. M., the defense rested.

Mr. Prosser after statement to the Court offered the following in evidence:

Application of Yuen Tai Kam for Insurance in the Prudential Insurance Company of America No. 3955636, by order of the Court was received and marked Defendant's Exhibit 1.

Declaration signed by Yuen Tai Kam made to the Medical Examiner, by order of the Court was received and marked Defendant's Exhibit 2.

Stipulation as to Dr. Iga Mori, Dated April 1924, by order of the Court was received and marked Defendant's Exhibit 3. L.—No. 10307.

Stipulation re Testimony of Dr. Ed. De Meglio as a witness on behalf of the defendant, by order of the Court was received and marks Defendant's Exhibit 4. L.—No. 10307. [91]

The defendant called as a witness Glenn L. McTargart, who was duly sworn and testified.

The defendant offered in evidence a cablegram in re rejection of Kam Claim—date April 4, 1923, signed Prudential, by order of the Court was received and marked Defendant's Exhibit 5.

The defendant called as a witness Chun Tai Sung, who was duly sworn and testified.

The defendant called as a witness, Alfred L. Lange, who was duly sworn and testified.

The Court ordered the further trial of this case continued until Monday May 5th, 1924, at 2 o'clock P. M.

At 3 o'clock P. M., the court adjourned at term.  
By order of the Court.

WILLIAM HOOPAI,  
Clerk.

Monday, May 5, 1924.

[Title of Cause.]

### FURTHER TRIAL.

EUGENE H. BEEBE, Esq., T. C. B., Attorney for  
Plaintiff.

SANFORD B. D. WOOD, Esq., Assisting Attorney  
for Plaintiff.

F. M. PROSSER, Esq., (F. P. A. M.), Attorney  
for Defendant.

Both parties being ready to proceed with the trial in the above-entitled cause, Mr. Prosser recalled Mr. McTaggart, already sworn for further testimony.

The following witnesses were called by the defendant, duly sworn and testified:

4. Dr. F. F. Hedemann.
5. Dr. Wah Kai Cahg.
6. Dr. Howard Clarke.

The defendant offered in evidence a newspaper print picture of the Yuen Tai Kam, and by order of the Court was received and marked Defendant's Exhibit 6.

The defendant called as a witness (7) Dr. H. L. Arnold, who was duly sworn and testified.

The defendant offered in evidence an amendment, Sec. III, to its answer, which by order of the Court was received and marked Defendant's Exhibit 7.

At 3:00 o'clock P. M. both parties rested, and the Court ordered that the argument be had 9 o'clock A. M. to-morrow. [92]

Tuesday, May 6th, 1924.

Court convened at term at 9 o'clock A. M.

Present: Hon. JAS. J. BANKS, Third Judge  
Presiding.

WILLIAM HOOPAI, Clerk.

J. L. HORNER, Reporter.

[Title of Cause.]

TRIAL (CONTINUED).

EUGENE H. BEEBE, Esq. (T. C. B.), Attorney  
for Plaintiff.

SANFORD B. D. WOOD, Esq. (T. C. B.) As-  
sisting Atty. for Plaintiff.

F. M. PROSSER, Esq. (F. P. A. M.), Attorney for  
Defendant.

A. E. STEADMAN, Esq. (F. P. A. M.), Attorney  
for Defendant.

Mr. Prosser offered in evidence the original proof of claim together with the attending Physician's Statement and asked that it be marked the same as the newspaper photo of Yuen Tai Kam. The Court ordered that the same be received in evi-

dence and marked Defendant's Exhibit 6.

Mr. Beebe then argued to the Court and quoting several authorities.

At 10:05 o'clock A. M. Mr. Prosser argued.

At 10:30 o'clock A. M. the Court took a recess.

At 10:40 o'clock A. M., the Court resumed, and Mr. Prosser continuing his argument, also quoting certain authorities.

At 11:05 o'clock A. M., Mr. Beebe made his closing argument.

At 11:10 o'clock A. M., the Court adjourned taking the matter under advisement.

By order of the Court,

WILLIAM HOOPAI,  
Clerk. [93]

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In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Application for Writ of Error. Filed May 19, 1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk. Issued for Service May 20, 1924, at 7:50 A. M. J. A. Thompson, Clerk. Returned May 20, 1924, at 11:05 A. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant and Plaintiff in Error. [94]



[Title of Court and Cause.]

APPLICATION FOR WRIT OF ERROR.

To the Clerk of the Supreme Court:

Please issue a writ of error in the above-entitled cause to the Clerk of the Circuit Court, of the First Judicial Circuit, Territory of Hawaii, on behalf of The Prudential Insurance Company of America, defendant and plaintiff in error, returnable to the Supreme Court.

Dated at Honolulu, T. H. May 19th, 1924.

THE PRUDENTIAL INSURANCE COM-  
PANY OF AMERICA.

By FREAR, PROSSER, ANDERSON &  
MARX,

Its Attorneys. [95]

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In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Assignment of Error. Filed May 18, 1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk. Issued for Service May 20, 1924, at 7:50 A. M. J. A. Thompson, Clerk. Returned May 20, 1924, at 11:05 A. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H.,

Attorneys for Defendant and Plaintiff in Error.  
[96]

[Title of Court and Cause.]

### ASSIGNMENT OF ERROR.

Now comes The Prudential Insurance Company of America, defendant above named and petitioner for writ of error in the above-entitled cause and says that in the records, proceedings, judgments, decisions, rulings, orders and final judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in an action lately pending in said Circuit Court, wherein your petitioner was and is defendant and Chun Ngit Ngan was and is plaintiff, there is manifest, material and prejudicial error, and petitioner herein now makes, files and presents the following assignment of error upon which it relies, as, to wit:

### ASSIGNMENT OF ERROR No. 1.

That the Circuit Court erred in rendering and filing the decision in the above-entitled cause and in holding and deciding as a matter of law that a tender back of the premium of insurance and a demand for the return of the policy coupled with a notification that the defendant refused to pay said policy on the ground of fraudulent and untruthful statements made to the examining physician of the Company, [97] which tender, demand of return of the policy and notification of the grounds therefor, were made to the plaintiff, she being the bene-

ficiary named in said policy, within the contestable period named in said policy, was not a sufficient contest under the terms of said policy and under the law, to which said decision defendant through its counsel excepted, which exception was allowed.

ASSIGNMENT OF ERROR No. 2.

That the Circuit Court erred in rendering and filing its judgment in the above-entitled cause dated the 12th day of May, 1924, as follows:

“In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

L—No. 10307.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant.

JUDGMENT.

Pursuant to the decision duly rendered and filed herein,—

IT IS THE ORDER AND JUDGMENT OF THIS COURT, that the plaintiff, Chung Ngit Ngan, do have and recover of the defendant, The Prudential Insurance Company of America, the sum of Five Thousand Five Hundred Three and 33/100 Dollars (\$5,503.33), together with costs taxed at \$171.33.

Dated, Honolulu, T. H., this 12th day of May,  
A. D. 1924.

[Seal of Court.] (Sd.) JAS. J. BANKS,  
Third Judge of the Circuit Court, First Judicial  
Circuit, Territory of Hawaii." [98]  
to which rendition and filing defendant by its coun-  
sel duly excepted, which exception was allowed.

Dated, Honolulu, May 19th, 1924.

THE PRUDENTIAL INSURANCE COM-  
PANY OF AMERICA.

By FREAR, PROSSER, ANDERSON &  
MARX,

Its Attorneys. [99]

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In the Supreme Court of the Territory of Hawaii.  
October, 1923, Term. Error—No. 1556. From Cir-  
cuit Court, First Circuit. Judge James J. Banks.  
Chun Ngit Ngan, Plaintiff and Defendant in Error,  
vs. The Prudential Insurance Company of America,  
a New Jersey Corporation, Defendant and Plaintiff  
in Error. Bond on Writ of Error. Filed May 19,  
1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk.  
Frear, Prosser, Anderson & Marx, 507 Stangenwald  
Building, Honolulu, T. H., Attorneys for Defendant  
and Plaintiff in Error. [100]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That the Prudential Insurance Company of America as principal and the National Surety Company as surety are held and firmly bound unto Chun Ngit Nagn, plaintiff and defendant in error above named and her personal representatives in the sum of Six Thousand Dollars (\$6,000), lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves and our successors jointly, severally and firmly by these presents.

Sealed with our seals, and dated this 19th day of May, 1924.

The condition of the above obligation is such that whereas the said Chun Ngit Ngan, plaintiff and defendant in error above named, did recover a judgment against the above-bonded The Prudential Insurance Company of America in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, on the twelfth day of May, 1924, in words and figures as follows: [101]

“JUDGMENT.

Pursuant to the Decision duly rendered and filed herein,—

IT IS THE ORDER AND JUDGMENT OF THIS COURT, that the plaintiff, Chun Ngit Ngan, do have and recover of the defendant, The Prudential Insurance Company of America, the sum of



Five Thousand Five Hundred Three and 33/100 Dollars (\$5,503.33), together with costs taxed at \$171.33.

Dated, Honolulu, T. H., this 12th day of May, A. D., 1924.

(Sd.) JAS. J. BANKS,  
Third Judge of the Circuit Court, First Judicial  
Circuit, Territory of Hawaii.''

From which said judgment the said named principal obligor has prosecuted a writ or error from the Supreme Court of the Territory of Hawaii to said Circuit Court.

NOW, THEREFORE, if the said The Prudential Insurance Company of America, principal obligor above named shall pay the judgment in said original cause in case of failure to sustain the writ of error, then the above obligation to be void; otherwise to remain in full force and virtue.

THE PRUDENTIAL INSURANCE COM-  
PANY OF AMERICA.

Principal.  
By HAWAIIAN TRUST COMPANY,  
LIMITED,

Its Agent.

By A. S. DAVIS.

Its Vice-President.

By P. K. McLEAN, (Seal)

Its Vice-President.

Surety.

By GLEN A. McTAGGART,

Its Attorney in Fact.

By W. F. JAMIESON, (Seal)

Its Attorney in Fact.

O. K. as to form.

THOMPSON, CATHCART & BEEBE,  
Per E. H. BEEBE. [102]

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In the Supreme Court of the Territory of Hawaii October, 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Writ of Error. Filed May 19, 1924, and Issued Same at 3:22 o'clock P. M. J. A. Thompson, Clerk. Returned June 23, 1924, at 3:10 P. M. Robert Parker, Jr., Assistant Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant and Plaintiff in Error. Filed at 4 o'clock P. M., May 19, 1924. Sibyl Davis, Clerk. [103]

[Title of Court and Cause.]

#### WRIT OF ERROR.

The Territory of Hawaii, To the Clerk of the Circuit Court, of the First Judicial Circuit, Territory of Hawaii:

Application having been made on behalf of said The Prudential Insurance Company of America, defendant and plaintiff in error above named, for a writ of error in the above-entitled cause, you are commanded forthwith to send to the Supreme Court the record in said case.

WITNESS the Honorable EMIL C. PETERS,  
Chief Justice of the Supreme Court, this 19th day  
of May, 1924.

[Seal] J. A. THOMPSON,  
Clerk of the Supreme Court, Territory of Hawaii.  
[104]

[Title of Court and Cause.]

### RETURN.

To the Clerk of the Supreme Court:

The execution of the within writ appears by the  
record hereto annexed.

Dated, Honolulu, T. H., June 23, 1924.

SIBYL DAVIS,  
Clerk of the Circuit Court of the First Judicial Cir-  
cuit, Territory of Hawaii. [105]

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In the Supreme Court of the Territory of Hawaii  
October, 1923, Term. Error—No. 1556. From Cir-  
cuit Court, First Circuit. Judge James J. Banks.  
Chun Ngit Ngan, Plaintiff and Defendant in Error,  
vs. The Prudential Insurance Company of America,  
a New Jersey Corporation, Defendant and Plaintiff  
in Error. Notice of Issuance of Writ of Error.  
Filed May 19, 1924, at 3:22 o'clock P. M. J. A.  
Thompson, Clerk. Issued for service May 20, 1924,  
at 7:50 A. M. J. A. Thompson, Clerk. Returned  
May 20, 1924, at 11:05 A. M. J. A. Thompson,  
Clerk. Frear, Prosser, Anderson & Marx, 507  
Stangenwald Building, Honolulu, T. H., Attorneys  
for Defendant and Plaintiff in Error. [106]

[Title of Court and Cause.]

NOTICE OF ISSUANCE OF WRIT OF ERROR.

To the Above-named Plaintiff and Defendant in Error and to Messrs. Thompson, Cathcart & Beebe, her attorneys.

You, and each of you, will please take notice that a writ of error has issued from the Supreme Court of the Territory of Hawaii to the Circuit Court of the First Judicial Circuit, of the Territory of Hawaii, in the action lately pending therein in which The Prudential Insurance Company of America was defendant and said Chun Ngit Ngan was plaintiff, numbered and docketed in said court as Law No. 10307.

Dated, Honolulu this 19th day of May, 1924.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant and Plaintiff in Error.

By FREAR, PROSSER, ANDERSON & MARX,

Its Attorneys. [107]

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In the Supreme Court of the Territory of Hawaii. October 1923, Term. Error—No. 1556. From Circuit Court, First Circuit. Judge James J. Banks. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Praecipe. Filed

May 19, 1924, at 3:22 o'clock P. M. J. A. Thompson, Clerk. Issued for Service May 20, 1924, at 7:50 A. M. J. A. Thompson, Clerk. Returned May 20, 1924, at 11:05 A. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant and Plaintiff in Error. [108]

[Title of Court and Cause.]

#### PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause you are hereby directed to transmit to the Supreme Court of the Territory of Hawaii, the record in the above-entitled cause, including the documents hereinafter referred to: The amended complaint and summons, defendant's amended answer to said amended complaint, decision of the court and judgment entered thereon, the exception thereto filed by defendant, the stenographer's transcript of the evidence adduced at the trial of said action, together with all exceptions noted by the plaintiff in error, the Clerk's minutes in said court and cause and all exhibits received during said trial of said action.

Dated, Honolulu, May 19th, 1924.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant and Plaintiff in Error.

By FREAR, PROSSER, ANDERSON & MARX, Its Attorneys. [109]



No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1924. Error to Circuit Court, First Circuit. Chun Ngit Ngan vs. The Prudential Insurance Company of America, a New Jersey Corporation. Opinion of the Supreme Court. Filed December 11, 1924, at 1:55 P. M. J. A. Thompson, Clerk. [110]

[Title of Court and Cause.]

Error to Circuit Court First Circuit.

Hon. J. J. BANKS, Judge.

Argued November 1, 1924.

Decided December 11, 1924.

PETERS, C. J. PERRY and LINDSAY, JJ.

Insurance—Contract and policy—Clause of incontestability.

When an insurance company within one year from the date of the issuance of a policy notifies the sole beneficiary, the insured being dead, that the policy was obtained by the fraud of the assured, that it repudiates the policy on account of the fraud and that it is willing to return the amount of the first premium received by it and demands the return of the policy, it may in an action brought by the beneficiary after the expiration of one year to recover the amount of the policy defend on the ground that the policy was obtained by fraud, even though the policy contains a clause that it shall be incontest-

able after one year from its date of issue and even though the company did not within the period of one year institute *judicial* proceedings to cancel the policy on the ground of fraud. [111]

## OPINION OF THE COURT BY PERRY, J.

(PETERS, C. J., Dissenting.)

This is an action at law to recover the sum of \$5,000 and interest upon a policy of insurance. The policy was issued on May 1, 1922, and the assured died of tuberculosis on February 5, 1923; at Leahi Home, an institution for the care of persons so afflicted. This action by the beneficiary, to recover the amount of the insurance provided for in the policy, was commenced in June, 1924, more than one year after its issuance. The policy sued upon contains a provision that it shall be "incontestable after one year from its date, except for nonpayment of premium." In connection with his application for the policy the assured represented to the insurance company that he did not suffer from certain ailments mentioned in the application and in the examination by the company's physician and that he had not within a stated period last past consulted any physician with reference to any such ailment. There representations were untrue in fact. They were material and were relied upon by the examining physician and the insurance company in concluding to issue the policy. The insurance company did not, within one year from the date of the policy, institute any judicial pro-

ceedings to test the validity of the policy; but on April 7, 1924, after the death of the assured and within the period of one year from the issuance of the policy, it made a tender to the sole beneficiary named in the policy of the amount which it had received as the first premium from the assured, notified the beneficiary of the misrepresentations of the assured and of the fact that it considered the policy invalidated by the fraud and that it refused to be bound by the policy or to pay the amount of the insurance covered thereby and demanded the return of the policy. In its defense in the present action, the company proved these facts, including the fraud, by undisputed evidence and they were in substance found to be true by the trial court. That court, however, held that, because of the clause relating to incontestability [112] the fraud could not now be availed of as a defense in this case and gave judgment for the plaintiff for the sum of \$5,503.33, including principal and interest to date of judgment.

The only question presented by the parties for our consideration on this appeal is whether under the above-recited circumstances the clause relating to incontestability renders it impossible for the insurer to avail himself in this action of the defense of fraud and invalidity. Stated in another way, the sole question is whether the steps taken by the insurance company within the year were such as to authorize the company to present them by way of defense to the present action brought by the beneficiary.

The rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issuance. S. L. 1917, Act 115, sec. 50, subd. 3. See, for example, *Ebner vs. Ins. Co.*, 121 N. E. (Ind.) 315, 319. The language under these circumstances is deemed not to be that of the insurance company.

Another rule of construction, well settled in this jurisdiction, is that the words in an insurance contract "should be given their ordinary and popularly accepted meaning in the absence of anything to show that they were used in a different sense." *Alexander vs. Home Ins. Co.*, 27 Haw. 326, 328.

In our opinion the steps shown by the undisputed evidence to have been taken within the first year by the insurance company constituted a "contest" of the policy and render the defense of fraud available in the present action. [113]

1. The ordinary everyday meaning of the word "incontestable" leads to this conclusion. Nor is there any difficulty in ascertaining what that ordinary meaning is. The men who, because of the superiority of their knowledge of the English language, were chosen to prepare our dictionaries are all agreed on the subject.

“Incontestable. Not admitting of debate or controversy; \* \* \* incontrovertible; as, incontestable facts or testimony.

“Synonyms: \* \* \* incontrovertible; indisputable; \* \* \* unassailable.” Standard Dict.

“Contest. To contend; to contend about in argument, especially in opposition; dispute; challenge; call in question; litigate.” Standard Dict.

“Incontestable. Not contestable; not admitting of dispute or debate; \* \* \* incontrovertible; indisputable.

“Our own being furnishes us with an evident and incontestable proof of a Deity.

“Synonym: Indisputable; indubitable.” Cent. Dict.

“Contestable. That may be disputed or debated; disputable; controvertible.” Cent. Dict.

“Contestant. One who contests; a disputant; a litigant.” Cent. Dict.

“Contest, v. To argue in opposition to; controvert; litigate; oppose; call in question; challenge; dispute; as, \* \* \* his right to the property was contested in the courts.” Cent. Dict.

“Incontestable. Not contestable; not to be disputed, called in question, or controverted; incontrovertible; indisputable; as, incontestable evidence.

“Specif., insurance, such by its terms that payment in case of loss cannot be disputed by



the company for any cause except nonpayment of premiums;—said of a policy.

“Synonyms: Incontrovertible; indisputable; irrefragable; undeniable; unquestionable.” Webster’s New Int. Dict.

“Contest, v. To make a subject of dispute, contention or emulation; \* \* \* to call in question; to controvert; oppose; dispute.

“Synonyms: Dispute; controvert; debate; litigate; oppose; argue; contend.” Webster’s New Int. Dict.

“Incontestable. Incontrovertible; indisputable; not contestable; not to be disputed; that which cannot be called in question or controverted.” 31 C. J. 405, 406.

“Contest. The primary meaning of the verb ‘to contest’ is to make a subject of dispute, contention, or litigation; to call in question; to controvert; to oppose; to dispute. It is further defined as meaning, to defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by courts of law; to litigate.” 7 A. & E. Ency. L. 78.

None of the dictionaries contains the slightest suggestion that the only correct meaning of the verb “contest” is [114] to litigate in court or to oppose in court and not elsewhere. It can be used as meaning to dispute or oppose in court but that is not its only meaning. One of its well-known meanings is to dispute and to attack out of court. We reply upon these definitions. We believe that they are correct and that the ordinary meaning of

the word "incontestable" is "indisputable," "not to be disputed in any way" whether in court or out of court.

2. There is absolutely nothing in the policy to show that the word "incontestable" or its inferential antonym "contestable" was not used in its ordinary acceptance or was used only in its narrower meaning as importing a dispute or opposition or attack *in court*.

3. There is no provision in the policy to the effect that the "contest" which is permitted within the first year shall be by judicial proceedings only. The clause of incontestability was doubtless drawn by the ablest lawyers available to insurance companies—men who know the English language well and who were aware of the ordinary definitions given to the words "incontestable," "contestable" and "contest" in the dictionaries. When under these circumstances they saw fit to provide simply that after a stated period the policy should be "incontestable" without specifying that within that period the policy would be contestable *by judicial proceedings only*, the inference is certainly of the strongest that no such limitation was intended upon the methods open to the company within the period for contesting the policy.

4. The origin and the purpose of the clause of incontestability in policies are not open to doubt. Prospective applicants for insurance learned from the experience of those who had gone before them and from the frequency of attacks by insurers upon

[115] policies after the death of the insured, that after all there was not a great degree of certainty that after their deaths and after their self-denial for long periods of years in the payment of premiums the assurance of financial aid which was thought to be thereby conferred upon their children or other beneficiaries would be actually effectuated. Because of this uncertainty applications for policies became less frequent than could be desired by the insurance companies, hence the inclusion of clauses such as the one now under consideration whereby the companies waived the right which had been theirs to attack the validity of policies (except for one or two very limited causes) after the expiration of a short period, usually one or two years. This waiver brought to applicants the assurance that if an attack upon the policies for fraud or for causes other than the excepted ones was to be made it would be made within the very short period agreed upon and probably within the lives of the applicants and certainly while the evidence contradicting the alleged fraud or other ground of attack relied upon was still in existence and easily available to the insured or, in the event of his early death, to his beneficiaries. They could rest assured that such an attack, necessarily prompt, would be brought to their knowledge so that preparations could be made by them to meet it, either by judicial proceedings to perpetrate the evidence available or by a suit in equity to establish the validity of the policy or by an action at law to recover the value of the policy at the time of the repudiation

or by an action at law to recover the total amount of insurance after the death of the insured or by acquiescence in the repudiation, acceptance of the premium returned and the securing of insurance from some other company. This history is recognized and these purposes are fully subserved by reading the permitted [116] contestability (within the prescribed period) as referring to a contest or dispute *in pais* as well as to a dispute or contest in the courts.

5. As the word "incontestable" is undoubtedly used in the policy as meaning indisputable "in any way whatsoever," i. e., in court or out of court, so also the inferential antonym "contestable" means disputable by any or every method which constitutes a dispute or attack, i. e., in court or out of court.

6. The clause of incontestability relates to what may not be done after the prescribed period and does not attempt to prescribe what may be done within that period. As to the latter, the rights of the insurer are as broad as they would have been if the clause of incontestability were not in the policy. Without that clause those rights for the first year would certainly have included the right to dispute or attack out of court as well as to dispute or attack in court.

7. There is nothing in the requirement that after one year the policy shall not be contestable which prescribes or indicates *how* it may be contested within the year. Even the advocates of the sole judicial contest theory do not claim that the judi-

cial proceedings must terminate in a decree or decision within the prescribed period. According to their view the filing of the suit and the service of summons on the last day of the prescribed period would constitute a contest such as would satisfy the requirements of the policy. If this is so, and undoubtedly it is, then the only purpose which could possibly be subserved by the mere institution of the judicial proceedings would be that the contest was *commenced*, that notice was thereby served upon the insured or his beneficiary, within the prescribed time, that he had a contest upon his hands and that he must ascertain, if he [117] will, what evidence is available to him and preserve it and perpetuate it as far as possible if he does not acquiesce in the repudiation. All of these purposes are as well served by a contest or dispute out of court as by the judicial proceedings. If litigation after the expiration of the one year is not in violation of the policy, as it is not, merely because the judicial proceeding was instituted within the one year, then so also litigation after the one year is not in violation of the policy where it is in continuance or development of the contest *in pais* which was started before the expiration of the period. Of course, by the clause as to incontestability it was not contemplated by any of the parties to this contract that litigation after the one year could not be had. It is always possible for parties to litigate although it is not always possible for them to succeed; and it is permissible and correct that



there should be litigation after the prescribed period to establish rights which accrued and became fixed within the period.

8. Under the very clause of incontestability now under consideration it is entirely clear that the policy is contestable, for nonpayment of premiums, even after the first year. Do advocates of the opposing theory mean that after the first year the only way in which the company can "contest" the policy is judicially? Such a contention would be wholly unsupportable. A repudiation by acts and words out of court would clearly suffice, throwing the burden upon the beneficiary or the insured, as the case might be, of suing if he wished to do so. If this is so in the respects in which the policy is contestable after one year, why is it not equally so in the respects in which it is contestable during the first year? We think that it is.

In holding as we do, we appreciate that in point of [118] numbers the authorities are overwhelmingly against us; but with all respect, we think that, in reason, they are not.

The case of *Mut. Life Ins. Co. of New York vs. Hurni Pkg. Co.*, 263 U. S. 167, is cited by the insurance company as sustaining its contention. If it were a decision on the point, our duty in the case at bar would be greatly simplified but we cannot find that in that case the Court expressed any view upon the point now under consideration. What it held was that the "date of issue" referred to in the clause of incontestability in the policy then before the Court was the one speci-

fied in the policy "although this (by agreement of the parties) was earlier than the dates of actual execution and delivery,"—question entirely different from that now before us.

In the same case upon a second trial (280 Fed. 18, 20) the lower Court said: "We are equally of opinion that a repudiation of the claim of defendant in error" (the beneficiary) "such as that made in the letter of August 24th" (the steps taken by way of repudiation were wholly out of court) "was a sufficient act of contest, and that court proceedings were not essential to the assertion of the right, as counsel for defendant in error contend." While this is an adjudication in favor of our construction of the policy, the reasoning which moved the Court is not set forth in the opinion.

The only well-reasoned opinion which has come to our attention in support of the view that a non-judicial contest within the prescribed period will suffice to protect the rights of the insurance company is that of Judge Cochran of the United States District Court, reported in *Mut. Life Ins. Co. of New York vs. Rose*, 294 Fed. 122, at pages 132, 133 and 134. In that case the insurer after the expiration of the period named in the incontestability [119] clause brought suit to cancel the policy on the ground of fraud. Within the time limited it had repudiated the policy, tendered the premium to the insured and demanded a return of the policy. The suit was brought in the lifetime of the insurer. The question as stated

by the Court was, "whether, if a policy of insurance has been rescinded for fraud in the way thus pointed out, during the period of contestability, may not such rescission be relied on as a ground of a suit in equity to cancel the policy, brought after the expiration of such period, or may it be pleaded as a defense to a suit brought on the policy after the expiration of such a period?" The question was answered by the Court in the affirmative. It may be that in one respect as to the facts that case differs from the case at bar, for in that case the tender of the premiums already paid was made to the insured himself and from him the return of the policy was demanded. In the case at bar the tender would seem to have been made to the wrong party. The estate of the decedent and not the beneficiary of the policy was entitled to a return of the premium. Nevertheless it is far from clear that a tender of the premium was necessary in the case at bar in order to constitute a rescission *in pais* by the act of one party alone, to wit, the insurance company. A tender to the beneficiary certainly was not necessary, because she was not entitled to it. A tender to the administrator was probably not a prerequisite to a rescission as against the beneficiary, particularly in view of the undisputed evidence that by its acts the insurance company made clear that it was not endeavoring to retain the premium while cancelling the policy. It was obviously anxious to return the premium to the person entitled to it. Again, it does not appear from

the record that any administrator of the estate was ever appointed and in the absence of such an [120] appointment there could be no tender to anyone representing the estate of the decedent. If a tender to the beneficiary was not under the circumstances of this case a prerequisite to a completed rescission by the insurance company alone, the Rose case is parallel in its facts to the case at bar. However that may be and even assuming that a tender was an essential prerequisite and that there was no completed rescission by the insurance company, nevertheless it remains true that the Rose case is a direct authority to the effect that a nonjudicial contest within the year will suffice to meet the requirements of the policy and will justify the insurance company in pleading that contest as a defense to an action upon the policy brought by the beneficiary after the lapse of the prescribed period. The Court held, after a careful consideration of the facts and the law, that the steps taken by the insurance company within the year, to wit, the tender, the repudiation on the ground of fraud and the demand for the policy, while they were admittedly not a judicial contest, nevertheless constituted a "contest" and were available in defense to the action at law brought by the beneficiary after the prescribed time limit.

Once it is held or admitted that *some* acts out of court may constitute a contest within the inferential contestability provision of the contract then the judicial nature of the dispute can no longer

be said to be the boundary or line of demarcation between a sufficient contest and an insufficient contest. One set of facts *in pais* is just as good as another set of facts *in pais* provided it constitutes an attack on the policy or a dispute. In this connection it must always be borne in mind that the ultimate test to be considered is not whether there has been a "rescission" but whether there has been a "contest." The word [121] "rescission" does not appear in the clause under consideration or anywhere else in the contract in connection with this same subject. The fact that the company had gone so far in the Rose case as to make alone a completed rescission and cancellation of the fraudulent contract was a good reason for holding that the company had contested the validity of the policy within the prescribed period; but it does not follow that such a completed rescission is an indispensable and the only method of constituting a contest *in pais*.

A few comments will now be made with reference to the authorities holding that a judicial contest alone will suffice to protect the insurance company.

A writer in the Central Law Journal, Vol. 97, No. 3, after a review of the cases summarized his own reasoning in these words: "To give the word 'contest' the meaning insisted upon by the companies would be treating it as if the word 'dispute' had been used instead. The courts will not attribute to the parties, in the selection of the language used in the clause, a futile or a useless



purpose. The clause certainly was intended to mean something and was intended to be enforced. Certainly there would be no means of enforcing the contract if the word 'contest' means 'dispute.' No one could prevent the company, notwithstanding its contract, from disputing liability. \* \* \* since contracts may only be enforced by the courts, \* \* \* it is logical to conclude that the parties \* \* \* had in mind a contest in a court of competent jurisdiction." The weakness of this reasoning is that it is equally true that if "contest" means only a *judicial* dispute, no one could prevent the company from instituting judicial proceedings and thus disputing liability.

Many of the courts base their construction of the clause in whole or in part upon the statement that the clause is "a statute [122] of repose and limitation." To a certain extent, it is; but only to the extent indicated by the language of the provision. In other words, the mere thought that the provision was intended as an assurance of repose and limitation of the company's rights does not throw light upon the meaning of the words "incontestable," "contestable" or "contest." Under our view, as well as under the opposing view, the clause is similiar to a statute of repose and limitation. By it, under our view, the company waives and abandons certain rights of dispute which it otherwise would have had beyond the prescribed period and is compelled to ascertain whether or not the policy was secured by fraud and to make its contest or dispute of the policy and necessarily to inform

the insured or the beneficiary, as the case may be, of its repudiation, opposition and attack upon the policy,—all within the time limited. In other cases, as for example, *Am. Trust Co. vs. Life Ins. Co.*, 92 S. E. (N. C.) 706, 711, and *Thistle vs. Ins. Co.*, 261 S. W. (Tenn.) 667, repudiation, notice and tender, not acquiesced in by the insured, were held not to constitute a rescission or cancellation. It is there said that it takes two to rescind or cancel a contract and that if two will not agree to a rescission, then the only recourse is to a judicial tribunal having jurisdiction to annul and that, therefore, a judicial proceeding must be instituted by the insurer within the period of contestability. These arguments presuppose that a rescission is an essential part of a contest or at least proceed on the theory that the test is whether there has been a rescission rather than whether there has been a contest. It would seem to be too obvious to require further comment that a rescission is not an essential ingredient of a contest. In a contract for the sale of goods, payment is demanded. It is refused, not on the ground of fraud but on the sole [123] ground that the purchase price has already been paid in full in coin. Under a building contract demand is made for the erection of servants' quarters. Performance is refused, not on the ground of fraud, but on the sole ground that such erection is not required by the terms of the contract. In neither instance is there a rescission and yet in both instances the contest

is on in full force whether the refusal is conveyed by mere words out of court or in a formal answer in court. Moreover it does not always take two to effectuate a rescission of a contract for fraud. One alone can do so as pointed out by Bigelow on Fraud in passages quoted by Judge Cochran in *Mut. Life Ins. Co. vs. Rose, supra*, at page 132.

Other decisions, like that in *Insurance Co. vs. Cranford*, 257 S. W. (Ark.) 66, are based solely upon precedents, upon the plea that there should be uniformity in policies of insurance both in form and in the interpretation of the language given. The authorities in favor of the judicial contest view are not in any proper sense to be regarded as a rule of property and if they are in error there is no good reason why the error should not now be departed from and correct principles adopted.

In a number of cases it is said that under the clause of incontestability, the insurance company must within the time limited make a defense to an action of the policy "or take affirmative action,"—without defining what that affirmative action should be. We do not understand that this is in itself a statement of any reason for holding that the contest required can be a judicial one only. It is at most a statement of that conclusion. If by affirmative action is meant any action in court or out of court, we agree with the statement; but if, as is probable, affirmative action *in court only* was intended, we think that the conclusion [124] is correct, for the reasons outlined above.

Still other cases, like that in 203 Pac. (Okl.) 192, held that the word "contest" presupposes that the struggle will be before some tribunal with power to determine it and dispose of it. We do not understand this to be an element in the meaning of the word. None of the lexicographers speak of it as a necessary element while all recognize by the meanings given that the word can refer to and include a contest or dispute out of court as well as a contest in court before a tribunal with power to decide it. To hold that under the policy before us in all cases of contestability the contest shall be had before a judicial tribunal would be adding to the policy a term or a condition not now contained therein.

In other instances, as for example, in the same Oklahoma case last referred to, it is said that the insurance company is not sole judge of the falsity of the answers or of the question whether a fraud was committed upon it by the assured and that, therefore, a judicial decision is necessary and a judicial contest is contemplated. Undoubtedly the insurance company is not the sole judge of the falsity of the representations made to it by the insured. That is as true when the claim or defense of fraud is presented in a judicial proceeding as it is when the claim is made out of court. Whether the insurance company makes its claim by bill in equity or by defense of an action at law or by steps taken out of court by way of repudiation of the policy, it is not attempting in any of those instances to set itself up as the judge of the fraud.

It is making its claim and in the making of it is presenting a dispute or contest; and that is all that the policy requires to be done within the period stated.

In still other cases, like 257 S. W. (Ark.) 66, 69, it is [125] said that "a contest in law implies an adversary proceeding in which matters in controversy may be settled by the courts upon issue joined." A sufficient answer to this is to say that the policy does not specify a contest in law and does not specify any particular mode of contest whatever. All that it says inferentially is that within the period named the policy shall be contestable.

In some of the cases it is said that the purpose of the clause is to force the raising and settlement of any issue (by way of attacking the policy) *during the assured's lifetime* and much is made of the point that after his death he cannot speak. But the contestability within the short period prescribed it not made to depend upon the continued existence of the insured. All of the modern cases are agreed on that point. The short period, whether one year or two years, of contestability is granted and reserved to the insurance company wholly irrespective of whether the insured lives during the whole of that period or dies the day after the policy is issued. The company still has in the latter instance the remainder of the period in which to conduct its investigation and to make its contest. It may have been thought in the framing of the provision that in all probability most of



the insured persons would survive the short period named and thus be able to take part themselves in preparing their defense to the charge of fraud; but it was doubtless also thought that even if he died within the period it was only the part of fairness to allow the insurance company at least the time named within which to search for and find the fault.

There are other cases which are sometimes cited in support of the view more favorable to the beneficiary but which in reality, while deciding other questions of construction, do not decide the question as to what manner of contest within the period will satisfy the requirements of the policy. One of these is *Wright vs. Mut. Ben. Assn.*, 43 Hun, 61, a case which has been often referred to in [126] later cases as the one in which the line of decision began to the effect that by contest is meant a judicial contest only. The case as we read it decides nothing of the sort and confines itself to a consideration and decision of other questions, one being whether the expression "no question as to the validity" was in terms broad enough to exclude the defense of fraud sought to be established and the other being "whether the provision so construed contravenes any rule of public policy and is for that reason void." The Court did say in the course of its discussion of the question of public policy: "The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer

must test, if ever, the validity of the policy"; but it did not express itself as to what manner of test would be necessary in such cases. The question of whether certain steps out of court could constitute a test within the meaning of a clause of incontestability did not arise upon the facts of that case and was not in any wise considered by the Court.

The judgment is set aside and a new trial granted.

M. F. PROSSER and A. E. STEADMAN  
(FREAR, PROSSER, ANDERSON & MARX  
and A. E. STEADMAN on the briefs), for  
Plaintiff in Error.

E. H. BEEBE and MARGUERITE K. ASHFORD  
(THOMPSON, CATHCART & BEEBE and  
MARGUERITE K. ASHFORD on the brief),  
for Defendant in Error.

ANTONIO PERRY.

ALEXANDER LINDSAY, Jr. [127]

#### DISSENTING OPINION OF PETERS, C. J.

On May 1, 1922, the Prudential Insurance Company of America issued to Yuen Tai Kan, the insured, its certain life insurance policy of even date wherein it agreed among other things that in the event and upon due proof of the death of said Yuen Tai Kan it would pay to Chun Ngit Ngan, the wife of the insured, as beneficiary, the sum of \$5,000. The policy contained the following incontestable clause: "This policy shall be incontestable after one

year from its date except for nonpayment of premium \* \* \* .” The insured died February 5, 1923. On April 7, 1923, the agent of the insurance company notified the beneficiary, Chun Ngit Ngan, that it refused to be bound by the policy on the ground of fraud on the part of the assured in its procurement, requested of the beneficiary that she deliver the policy to it for cancellation and tendered her the full annual premium theretofore paid in advance by the assured. The request for cancellation was refused and the tender declined. Subsequent to May 1, 1923 (after one year from the date of the policy), the beneficiary brought an action at law against the insurer for the amount of the policy. The insurer by way of answer to the complaint of the beneficiary, in addition to the allegations of general denial and notice of the defense of fraud, specially answered as follows: “That subsequent to the death of Yuen Tai Kan, named as the insured in said policy of insurance, on the 7th day of April, 1923, and prior to the expiration of one year from the date thereof, defendant notified Chun Ngit Ngan, named in said policy as beneficiary thereunder, that it refused to recognize such policy as valid because of false and erroneous statements made by the assured upon his examination by the medical examiner for defendant [128] prior to the issuance of said policy, and did then and there tender to said Chun Ngit Ngan the entire sum theretofore paid as premium under said policy, which tender was refused by the said Chun Ngit Ngan, and did demand a return of said policy by said Chun

Ngit Ngan to the defendant.” Trial was had jury waived on April 21, 1924. The beneficiary made out a *prima facie* case. The insurance company offered evidence tending to prove and the Court found that the policy had been procured by the assured by fraud. The Court, however, found for the beneficiary, holding that the policy by its terms was incontestable after one year from its date and a year having elapsed since the date of the policy the insurance company was foreclosed from defending against the policy on the ground of fraud and ordered that judgment be entered accordingly.

The insurance company prosecuted error, assigning the following errors: 1. “That the circuit court erred in rendering and filing the decision in the above-entitled cause and in holding and deciding as a matter of law that a tender back of the premium of insurance and a demand for the return of the policy coupled with a notification that the defendant refused to pay said policy on the ground of fraudulent and untruthful statements made to the examining physician of the company, which tender, demand of return of the policy and notification of the grounds therefor, were made to the plaintiff, she being the beneficiary named in said policy, within the contestable period named in said policy, was not a sufficient contest under the terms of said policy and under the law, to which said decision defendant through its counsel excepted, which exception was allowed.” 2. “That the circuit court erred in rendering and filing its judgment in the above-entitled cause dated the 12th day of May,

1924, as follows": (Here follows the judgment [129] in stereotyped form.)

No charge of fraud was made against the beneficiary in the procurement of the policy. It is admitted by the insurer that no other action was taken by it to cancel the policy except that of April 7, 1923.

The policy in clear and unambiguous terms prohibits the insurer from contesting the policy at any time after the expiration of one year from its date except for the nonpayment of premium. The full annual premium had been paid in advance so the exception is not involved. The action on the policy was brought by the beneficiary after the expiration of one year from the date of the policy. The answer of the insurer setting up the defense of fraud was necessarily filed after the expiration of one year from the date of the policy. Unquestionably the filing of the answer and setting up of the defense of fraud by the insurer in an action by the beneficiary upon the policy constitutes a contest. Hence the insurer by its answer is contesting the policy after the expiration of a year from its date in the face of and contrary to the express prohibition of the incontestable clause. Clearly the insurer is foreclosed from contesting the policy unless by its acts of repudiation of the policy of April 7, 1923, it is exempted from the operation of the incontestability clause.

The purpose of the incontestability clause is obvious. Fraud vitiates a contract but until some action is taken by the defrauded party thereto the



contract continues in existence. The contract is voidable and not void. It is upon the discovery of the fraud by the defrauded party that the necessity of determination arises—whether the defrauded party will continue with the contract or rescind for fraud. “The party who has been induced to enter into a contract by fraud, or by concealment or misrepresentation in any matter such that [130] the truth of the representation made, or the disclosure of the fact, is by law or by special agreement of the parties of the essence of the contract, may affirm the contract, and insist, if that is possible, on being put in the same position as if the representation had been true. Or he may at his option rescind the contract, and claim to be restored, so far as may be, to his former position within a reasonable time after discovering the misrepresentation \* \* \* .” Wald’s *Pollock on Contracts*, marg. p. 576, top p. 705. Until the discovery of the fraud the defrauded party is not called upon to act. Hence it is that irrespective of the period of existence of the contract, if the defrauded party has been ignorant of the existence of the fraud, his prior acts of affirmation of the contract do not bar him from subsequently disaffirming it after the discovery of the fraud. The time of the discovery of the fraud is the turning point in the subsequent relations of the parties. In the absence of an incontestability clause a life insurance policy may be avoided by the insurer at any time so long as the acts of avoidance are taken within a reasonable time after the discovery of the fraud. But where a policy of life insurance contains an incontestability clause the

insurance company in effect waives its right of disaffirmance upon the discovery of the fraud if such disaffirmance is not undertaken prior to the incontestability clause coming into effect. Hence the authorities are uniform to the effect that incontestability clauses found in life insurance policies are in the nature of short statutes of limitation limiting the time within which the insurer may contest the policy. "The practical and intended effect of the stipulation is \* \* \* to create a short statute of limitations in favor of the insured, within which [131] limited period the insurer must test, if ever, the validity of the policy." *Wright vs. Mutual Benefit Ass'n*, 43 Hun (N. Y.), 61 (1887), affirmed 118 N. Y. 237 (post). "While it is true that fraud voids all contracts, it is equally true that it is competent for the law-making power to fix a definite time in which an action shall be brought to declare a fraudulent contract void, and a failure on the part of the person defrauded to bring such action within the time designated would have the effect of debarring him from the right to set aside such a contract. While in such cases it is generally provided that the limitations so fixed shall not begin to operate in favor of the party who has committed the fraud until the same has been discovered, the duty is placed upon the party who seeks to avoid the contract on the ground of fraud to make such efforts to discover the fraud as would amount to ordinary diligence in law. *Civ. Code*, Secs. 3669, 3711-3785; *Little v. Reynolds* (Ga.), 28 S. E. 919, and cases cited. As the law may prescribe such a limitation in which actions shall be

brought by the party to be affected, it is also within the power of the contracting parties to agree among themselves upon a period of time which would amount to a statute of limitations, either greater or less than the period fixed by the law. *Telegraph Co. vs. James*, 90 Ga. 254, 16 S. E. 83; *Brown vs. Insurance Co.*, 24 Ga. 97; *Melson vs. Insurance Co.*, and *Maril vs. Same*, 97 Ga. 723, 25 S. E. 189; *Ritch vs. Association*, 99 Ga. 112, 25 S. E. 191. The period fixed by law being intended for the benefit of the parties interested in the contract, and for their protection, it is competent for them to stipulate that the time which the law gives them to act shall be shortened, on the one hand, or lengthened, on the other. Parties interested in the contract may waive the [132] benefit of the statute of limitations fixed by the law, the effect of the waiver being either to make a longer or shorter period than the law prescribes." *Mass. Ben. Life Ass'n vs. Robinson*, 30 S. E. (Ga.) 918, 925 (1898). "Incontestable provisions in insurance policies have been held valid as creating a short statute of limitations in favor of the insured; the purpose of such provisions being to fix a limited time within which the insurer must ascertain the truth of the representations made." *Monahan vs. Met. Life Ins. Co.*, 119 N. E. (Ill.) 68, 69 (1918). "(1) The plea alleges facts showing that the insured was guilty of intentional fraud in procuring the policy, and the demurrer admits them. It is an elementary rule of law that fraud vitiates all contracts, and therefore the contract was voidable by the company. When the insured died it had a complete defense to

any action on the policy which his representative might bring. The only question, therefore, is whether the company was still bound, after the death of the insured, by the limitation of one year from the date of issue of the policy in which to contest it. (2) We have held that the provision in a policy of life insurance that it shall be incontestable after one year from the date of its issue, provided the premiums are duly paid, is a valid provision, which bars the insurer from making any defense against the policy, after the expiration of the contestable period, except for nonpayment of premiums, and that after the lapse of that period even fraud in procuring the policy is not available to avoid it. *Royal Circle vs. Achterrath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; *Flanigan vs. Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178; *Weil vs. Federal Life Ins. Co.*, 264 Ill. 425, 106 N. E. 246, Ann. Cas. 1915D, 974; *Mona-han vs. Metropolitan Life [133] Ins. Co.*, 283 Ill. 136, 119 N. E. 68, L. R. A. 1918D, 1196. This is in accord with the substantially unanimous decisions of the courts which hold that the language admits of no reasonable construction other than that the company reserves to itself the right to ascertain all the matters and facts material to its risk and the validity of its contract for one year; and that, if within that time it does not ascertain all the facts and does not cancel and rescind the contract, it may not do so afterward upon any ground then in existence. When the execution of a contract has been procured by the fraud of one of the parties, the innocent party, upon discovering the fraud, may

still insist upon the contract or may rescind it. He must, however, if he desires to repudiate it, do so promptly upon discovering the fraud and consistently adhere to his intention. By delay or vacillation he waives his right to rescind. The effect of the stipulation in the policy is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, but its practical and intended effect is to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy. *Wright vs. Mutual Benefit Life Ass'n*, 43 Hun (N. Y.), 61; *Id.*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749; *Massachusetts Benefit Life Ass'n vs. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; *Clement vs. New York Life Ins. Co.*, 101 Tenn. 22, 46 S. W. 561, 42 L. R. A. 247, 70 Am. St. Rep. 650; *American Trust Co. vs. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706; *Murray vs. State Mutual Life Assurance Co.*, 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742; *Mutual Life Ins. Co. vs. Buford*, 61 Okl. 158, 160 Pac. 928; *Metropolitan Life Ins. Co. vs. Peeler (Okl.)*, 176 Pac. 939, 6 A. L. R. 441." *Ramsay vs. Old [134] Colony Life Ins. Co.*, 131 N. E. (Ill.) 108, 109 (1921). "Payment was refused by the company on the ground that the insurance had been procured by false representations of a material character which had been made by the insured in his application for the purpose of procuring the policies of insurance. No answer was filed to the present suit within one year after the date of the insurance policies, and no suit has been brought by



the insurance company to set aside the contract of insurance because it had been procured by fraudulent representations on the part of the insured. Thus it will be seen that the sole issue raised by the appeal depends upon the construction to be given the incontestable clause which is set out in full in our statement of facts. In substance, it provides that policies shall be incontestable after one year if the premiums are duly paid, except for the violation of the provision relating to military or naval service in time of war. The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision. It is said that the practical and intended effect of such a stipulation is to create a short statute of limitations. By the stipulation the insurance company agreed that it would take a year to investigate and determine whether it would contest the policies of insurance, and that, if it failed within that time to discover any grounds for contesting the same, it would make no further investigation and would not thereafter contest the validity of the policies." *Missouri State Life Ins. Co. vs. Cranford*, 257 S. W. (Ark.) 66, 67 (1923).

The question therefore arises as to what steps the insurer must take by way of disaffirmance to exempt it from the application of and the limitations imposed by the incontestability [135] clause of an insurance policy so that in the event of a suit by the beneficiary after the elapsation of the first

year of the policy there is available to it in such suit the defense of fraud.

The contention of the plaintiff in error is best understood by the following quoted excerpt from its brief; "It is uncontradicted by the evidence and so found by the trial court that the insurer upon learning of the fraud of insured and within a period of one year from the date of the policy, tendered to the beneficiary the premium which had been paid, demanded a surrender of the policy and notified the beneficiary that it did not recognize the policy as a valid contract and elected to rescind said policy because of the fraud of insured in the declarations to the medical examiner. The insurer took, therefore, within a period of one year all of the steps to renounce liability, rescind the contract and put the parties *in statu quo* which were possible outside of court."

This the plaintiff in error contends was a "contest" which exempted it from the application of the one-year incontestability clause and was sufficient to permit it, after one year from the date of the policy, to plead the fraud of the assured in an action at law brought by the beneficiary. Plaintiff in error rests its contention primarily upon two cases, namely, Life Insurance Co. vs. Hurni Packing Co., 280 Fed. 18, and Met. Life Ins. Co. vs. Rose 294 Fed. 122.

The Rose case depends for its conclusion upon the Hurni Packing Co. case and Jefferson Standard Life Ins. Co. vs. McIntyre, 285 Fed. 570. The Hurni Packing Co. case contains unsupported *dicta*

to the effect that a letter by the insurer to the beneficiary denying liability was a sufficient contest and that court proceedings were not essential to the right. [136] I do not consider this language persuasive. The Court did not deny that some affirmative action must be taken by the insurer to cancel the policy prior to the incontestability clause coming into effect. On the contrary it said: "Affirmative action was necessary to the consummation of the inchoate right created by the terms of the policy." But if the effect of the decision is that rescission may be taken personally against the beneficiary exclusive of the legal representatives of the assured the case was in my opinion incorrectly decided. Moreover, if this case holds that rescission by act of the insurer, without the concurrence of the assured, taken prior to the incontestability clause coming into effect, exempts the insurer from the application of such clause, it is contrary to the weight of Federal authority. See *N. W. Mutual Life Ins. Co. vs. Pickering* (Fifth Circuit Court of Appeals), 293 Fed. 496-499; *Jefferson Standard Life Ins. Co. vs. Keeton* (Fourth Circuit Court of Appeals), 293 Fed. 496-499; *Jefferson Standard Life Ins. Co. vs. McIntyre* (Fifth Circuit Court of Appeals), 294 Fed. 886, 887, all of which hold in effect that mere repudiation of a policy does not constitute a "contest."

The decision in the Keeton case is peculiarly interesting. There as here the policy contained a one-year incontestability clause. There similarly as here rescission by act of the insurer was at-

tempted against the beneficiary after the death of the insured but during the first year of the policy. If such rescission operated to cancel the policy, then the insurer could have within the decision of the *Rose* case availed itself of its rescission at law by way of defense to any action at law that the beneficiary might bring upon the policy. In other words, the insurer had a plain, adequate and [137] complete remedy at law. And yet the Court holds that the insurer has not an adequate remedy at law and entertains jurisdiction of a suit in equity for rescission. The reason for equitable interference is perfectly plain—that rescission by act of the insurer did not operate to cancel the policy and restore both parties thereto to their respective *statu quo ante* and that if the beneficiary delayed bringing suit at law until the expiration of the first year of the policy the attempted rescission *in pais* would not be available as a defense. There were the “peculiar circumstances” which rendered *Insurance Co. vs. Bailey*, 13 Wall. (U. S.) 616, and *Cable vs. U. S. Life Ins. Co.*, 191 U. S. 288, inapplicable. The applicability of the *Rose* case is discussed later.

In the *McIntyre* case (285 Fed. 570), cited in the *Rose* case, the U. S. District Court of Florida held that mere denial of liability by the insurer to the beneficiary on the ground of the fraud of the assured made within the first year of the date of the policy exempted the insurer from the provisions of a one-year incontestability clause contained therein. This case, however, was reversed

by the Circuit Court of Appeals of the Fifth Circuit (294 Fed. 886), where the Court said: "A mere denial or repudiation by an insurer of its liability under a policy, accompanied by a tender of the premium paid, is not a contest within the meaning of such a provision as the one above set out. *Northwestern Mutual Life Ins. Co. vs. Pickering*, 293 Fed. 496, in the United States Circuit Court of Appeals, Fifth Circuit, present term. The provision in a life insurance policy that 'this policy shall be incontestable, except for nonpayment of premiums, provided two years shall have elapsed from its date of issue,' has the effect of making the policy incontestable, on a ground other than the excepted one, by the insurer after two years from its date of issue, though the [138] insured died within that time. *Mutual Life Ins. Co. of N. Y. vs. Hurni Packing Co.* (November 12, 1923), 44 Sup. Ct. 90, 68 L. Ed.—. We think that the reasons stated in support of the conclusion reached in the last-cited case are applicable to the provision now in question. The contested policies did not cease to be in force upon the death of the insured. The contracts remained in force, upon the death of the insured immediately insuring to the benefit of the beneficiaries."

The overwhelming weight of authority is to the effect that in order that an insurance company may defend at law against an insurance policy containing a one-year incontestability clause after such clause has come into effect it must have during the first year of the life of the policy taken some step,



the immediate or ultimate legal effect of which is to cancel the policy within the first year of its life or to render it within that time of no further force or effect. The majority opinion recognizes the weight of authority but refuses to be guided by it.

The following excerpts from some of the State and Federal decisions are illustrative:

“An action for the recovery of the sum insured not being maintainable until after the death of the insured, one effect of the stipulation, if valid, is to prevent the insurer from interposing as a *defense* the falsity of the representations of the insured. But its effect is not to prevent the insurer from *annulling the contract* upon the ground of the fraudulent representations of the insured, provided *an action* for that purpose is brought in the lifetime of the insured and within two years from the date of the policy.” Wright vs. Mutual Ben. Ass’n, 43 Hun, 61, 65 (1887). “ \* \* \* it recognizes fraud and all other defenses but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations [139] and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which *to apply for redress* on account of it and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for

a shorter limitation thereon than that fixed by law and such an agreement is in accord with the policy of statutes of that character. (Wilkinson vs. First Nat. Fire Ins. Co., 72 N. Y. 499, 502.) No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years when in the end and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant instead of receiving the promised insurance may be met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not and never had an existence except in name." Wright vs. Mutual Ben. Ass'n, 118 N. Y. 237, 243 (1890). "It is true that fraud vitiates all agreements and undertakings based upon it, and they may be set aside at the instance of the party defrauded. So, in this case, fraud in obtaining the policy would vitiate it at the option and *upon the motion of the party defrauded*; but, under the provision in question, the party must within the year exercise his right *to repudiate and rescind it*. The effect of this agreement not to contest is to put the company in the attitude of being unable to set up any fraud or false swearing in obtaining the policy, or any other defense to it, save the one excepted, so far as its original validity is concerned. Unless the language be thus construed, it is impractical to put any reasonable interpretation on it. Unless it is the object and purpose of the provision

[140] to cut off all defenses arising out of the false statements of the applicant to obtain it, it is difficult to see what practical benefit the insured is to derive from it. It has been well said: 'The effect of the provision is to prevent the insurer from interposing as a defense the falsity of the representations of the insured, which is fraud. But it does not prevent an abandonment, rescission and cancellation of the contract for such fraud provided the *action* for that purpose is brought within a year.' "

Clement vs. N. Y. Life Ins. Co., 46 S. W. (Tenn.) 561, 562 (1898). "The practical, and evidently the intended, effect of the stipulation in question was to create a short statute of limitations in favor of the insured, within which limited period the insurer must, if ever, *test* the validity of the policy."

Murray vs. State Mut. Life Ins. Co., 48 Atl. (R. I.) 800 (1901). "An examination of the following cases will show that the holding of the courts of this country has been, *almost universally*, that every defense to a policy of insurance embraced within the terms of the 'incontestable clause' is completely lost to the insurer if it fails to make the defense or *take affirmative action within the time limited by the policy*." Indiana etc. Life Ins. Co. vs. McGinnis, 101 N. E. (Ind.) 289 (1913). "The admissions in the answer show beyond question the issuance of the policy, payment, and proper tender of payment of the premiums thereon, death of the insured, notice to the company of such death, and refusal of the company to pay such policy, and that more than two years had elapsed since the

date of issue of the policy, and the defendant failing to show that within two years from the date of policy that legal action had been taken to avoid the policy on account of breaches of the warranties in the application for insurance, or that said policy had been cancelled with the assent [141] of the insured, the Court properly overruled defendant's demurrer to the evidence, correctly denied motion for a directed verdict for defendant, and properly directed a verdict for the plaintiff. \* \* \* If the insurer desired to avoid the policy, on the ground of misrepresentations contained in the application for insurance, it should, in the absence of the consent on the part of the insured and the beneficiaries named in the policy, have taken *legal steps* to do so within two years from the date of issuance of the policy, and, failing so to do within two years from the date of the issue of the policy, the policy of insurance was incontestable on the ground of breaches of warranties contained in the application." *Mutual Life Ins. Co. vs. Buford*, 160 Pac. (Okl.) 928, 930, 931 (1916). "One year is given to the defendant to make inquiry and investigation as to the health of the insured, and as to the statements made in the application and the policy, as an inducement to the contract. Within this time, if the defendant refused to perform its part of the contract and so notified the insured, three remedies are given to the plaintiff: '(1) He may elect to consider the policy at an end and recover its just value; (2) he may sue in equity to have the policy declared in force; (3) he may ten-

der the premiums and treat the policy as in force and recover the amount payable on it at maturity.' 14 R. C. L. 1004; *Day vs. Ins. Co.*, 45 Conn. 480, 29 Am. Rep. 693; *Ins. Co. vs. McCormick*, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 393. The insurance company also has the right, if it concludes that the policy has been improperly procured, to institute *an action* for the cancellation of the policy within the year 'The insured may maintain a suit in equity in a proper case to rescind or cancel the contract for fraud on the part of the company or its agent or for breach of contract. In like manner [142] the company may maintain a suit in equity to cancel a policy because of fraud upon the part of the insured or the beneficiary, as the case may be, or because the policy is a wager policy by reason of want of insurable interest.' 25 Cyc. 788; *French vs. Connely*, 145 Eng. Report (Reprint), 933; *Whittingham vs. Thornbrough*, 23 Eng. Report (Reprint), 734, *Asso. vs. Palmer*, 53 Eng. Report (Reprint), 768; *Insurance Co. vs. Dick*, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566. The two cases relied on by the defendant (*Ins. Co. vs. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Cable vs. Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188), to sustain the position that the insurance company has no right to bring an action to have the policy cancelled or not in point, because, in both of these cases the right was denied upon the ground that an action at law was pending upon the policy, the insured having died, and it was held that the insurance company did not have the right to go into a



court of equity as it could set up the defense in a court of law. It follows, therefore, that the conduct of the defendant, in notifying the insured that it would cancel the policy and in tendering the first premium which had been paid, did not rescind or cancel the contract, as the plaintiff did not consent thereto, and amounted to no more than a breach, and that the *remedy of the defendant was to institute an action for cancellation* within the year, and as it did not do so, the policy was in force at the expiration of the year. This is also in accordance with the authorities holding that if the defendant wished to contest and to avoid the payment of the policy and the force of the incontestable clause, it must take *affirmative* action within the time limited by the policy. \* \* \* The meaning of the terms, 'take affirmative action,' 'test the validity of the policy,' if in doubt, is made clear by the decision in *Wright vs. Benefit Ass'n*, [143] 43 Hun, 65, which was affirmed in 118 N. Y. 237, 23 N. E. 186. \* \* \* We are therefore of opinion as the plaintiff had an insurable interest in the life of the insured when the policy was issued; and as no *action* was brought by the defendant within one year from the date of the policy to have the contract of insurance *canceled or rescinded*, that the incontestable clause was in force at the death of the insured, and that the defendant is precluded thereby from relying on the defenses set up." *American Trust Co. vs. Life Ins. Co.*, 92 S. E. (N. C.) 706, 711 (1917). "It does not follow, however, that we concur in appellant's views respecting the rights of

the parties under such a construction, but rather that if, as a result of such investigation or of knowledge otherwise obtained, the insurer desires to contest the policy, appropriate steps to that end, either by a defense to an action brought on the policy in case of the death of the insured, or *by proper affirmative action* must be taken within the year, otherwise that the policy becomes incontestable, save as to conditions excepted from the noncontestable clause. Such a construction is in harmony with the language of the stipulation, and does not necessitate the interpolation of words, phrases or clauses not found therein." *Ebner vs. Ohio State Life Ins. Co.*, 121 N. E. (Ind.) 315, 320 (1918). "If, therefore, there is nothing in the clause itself changing its terms or effect upon death of the insured within one year, if the clause was inserted for the benefit of the insurance company, to enable it to increase its business, if the period of one year after which the policy was to become incontestable, was to afford opportunity to the company to make its investigations and to *commence an action* for the cancellation of the policy, and if during the whole of the year someone has been in existence, the beneficiary, against whom [144] an action could be brought, we see no reason for refusing to give the plaintiff the full benefit of the clause as it is written. The death of the insured did not place the defendant at any disadvantage under the policy, nor stop its investigations, nor did it affect its right to commence an action, and in most cases death would inure to the benefit of the company, if it contemplated an

action to cancel the policy by removing a hostile witness." *Hardy vs. Phoenix Mut. Life Ins. Co.*, 104 S. E. (N. C.) 166, 168 (1920). "It clearly appears, and in fact it is indisputable, that more than one year had elapsed since the issuance of the policy before *any act was done or action taken* by the defendant *to contest it*. Thus the defendant thereafter is, by the terms of its contract, precluded from voiding the policy for any cause whatever, except failure to pay the premium as provided in the policy. \* \* \* In other words, after the expiration of a year, where there is no default in the payment of the premium, and thereafter the death of the insured should occur, the defendant has no defense against the collection or payment of the amount specified in the policy. It, in substance, has stipulated to that effect in its policy." *Plotner vs. Northwestern Nat. Life Ins. Co.*, 183 N. W. (N. D.) 1000, 1003 (1921). "The insurance company agreed with the insured, if he would buy this policy for the benefit of his wife, it would not contest the payment of the insurance money after the expiration of one year from the date of the policy."

"The defendant assumed this clause gave it the arbitrary right to cancel the policy at any time within the year, regardless of the rights of the insured. This clause does not mention cancellation; it provides the conditions under which the policy shall be incontestable. Webster's International Dictionary defines these words as follows: 'Contest: Earnest struggle for superiority, defense, [145] victory, etc.; competition; emula-

tion; strife or argument.' 'Cancel: To annul or recall; to mark out by a cross-line or lines; to strike out; to blot out or obliterate; specif., of legal documents, to annul, or make void or invalid, by such marking, or (by extension) in any way.' To cancel presupposes power or authority to do the act—cancel the contract. To perform the physical act of cancelling a contract by obliterating it, drawing lines through it to strike it out or by writing upon it 'canceled,' without the authority to cancel it, is a nullity, and the contract remains in full force and effect. This clause does not even purport to give the insurance company authority to cancel the contract. It may only contest it under certain conditions and upon certain grounds and within a specified time. A contest is an earnest struggle for superiority, or a defense. Reserving in a contract the right to contest any of its terms or provisions presupposes the right to resist such contest, and *that such contest shall take place before some person or tribunal with power and authority to decide the questions raised by such contest.*" Reliance L. Ins. Co. vs. Thayer, 203 Pac. (Okl.) 190, 192 (1921). "The language is not ambiguous. It admits of no reasonable construction, as the courts have said in the cases already cited, other than that the company may have one year, and no more, for investigation of the questions material to its risk, and if it does not within that time, either as plaintiff or defendant, contest the policy, it cannot do so afterward. Such contest can be made *only by proceedings in court* to

which the insurer and the insured, or his representatives or beneficiaries, are parties. American Trust Co. vs. Life Ins. Co. of Virginia, *supra*; Mutual Life Ins. Co. vs. Buford, *supra*." Ramsay vs. Old Colony Life Ins. Co., *supra*. "The question seems to have been resolved against the defendant by the Illinois Supreme [146] Court and the construction of the incontestable clause contended for by plaintiff upheld, namely, that under the clause the defendant has two years from the date of the policy *in which to take affirmative action to cancel the same* or by a defense to a suit on the policy by the beneficiary within that period, and that *if no action is taken* within the two-year period the defendant is cut off from all defenses except nonpayment of premium, and the fact that the insured died within the period makes no difference." Lavelle vs. Met. Life Ins. Co., 238 S. W. (Mo.) 504 (1922). "Stipulations to the effect that a policy or certificate shall become incontestable for fraud in procuring the same after the lapse of a specified period from the date of its issue have been held valid as creating a short statute of limitations in favor of the insured, and as giving the insurer a limited period for the purpose of *testing* the validity of the policy. In such cases the company or association cannot set up fraud as a defense if the period so fixed is sufficient to enable the company or association by the exercise of proper diligence, to ascertain whether fraud has been practiced or not." Royal Circle vs. Achterath, 68 N. E. (Ill.) 492, 496 (1903). "An effect



of the provision in question was to fix a time limit for a contest of the policy by the insurer on a ground other than the nonpayment of premium. A contest so provided for *imports litigation, the invoking of judicial action* to cancel or prevent the enforcement of the policy, either by a suit to that end or by a defense to an action on the policy. A *mere denial or repudiation by the insurer of its liability under the policy, accompanied by a tender of the premium paid, is not a contest*, within the meaning of the provision. American Trust Co. vs. Life Insurance Co., 173 N. C. 558, 92 S. E. 706; Lavelle vs. Metropolitan Life Ins. Co., 209 Mo. App. 330, 238 S. W. 504; Pratt vs. Breckinridge, [147] 112 Ky. 1, 23, 65 S. W. 136, 66 S. W. 405" N. W. Mut. Life Ins. Co. vs. Pickering, *supra*. "Incontestable means not contestable. A contest in law implies an *adversary proceeding* in which matters in controversy may be settled by the courts upon issue joined. The great body of policy holders are persons who are not learned in the law and who have no knowledge of the judicial construction of pleadings. In the application of the rule just announced, we think the natural and most reasonable view is to hold that the insurer has not contested the policy until it has *acted* in the premises. The contract provides that the policy shall be incontestable after one year, and no action on the part of the insured or beneficiary can relieve the company of its duty to act. In order to contest the policy it was required to file an answer to the suit brought by the beneficiary within one year, *or to have insti-*

*tuted an action of its own in equity to cancel the policy on the ground of fraud."* Missouri State Life Ins. Co. vs. Cranford, *supra*. "The remedy of the defendant was to institute an action for cancellation within a year, and if it did not do so the policy was in force at the expiration of the year. In disposing of this question the learned chancellor, in his opinion, said: 'It takes two to make a contract and likewise it takes two to rescind one (Ault vs. Dustin, 100 Tenn. 666, 45 S. W. 981), or the judgment of a court of competent jurisdiction at the instance of the party having a good ground for rescission. It is true that the defendant undertook to rescind the contract in this case upon the ground of complainant's fraud in procuring it, on August 29, 1922, by delivering to complainant on that date a written notice to that effect and demanding the surrender of the policy. But complainant refused to agree to the rescission and refused to surrender the policy. The contract [148] was therefore not rescinded merely by the act of the defendant in giving said notice. It was open to the defendant thereafter to repent of its act and treat the policy as in full force and effect or it *might elect to have its right to rescind tested and enforced by a court, either by itself instituting a suit for that purpose or by interposing it as a defense if sued*. In my opinion it takes the one or the other of these steps to constitute a contest of the policy within the meaning of the statute and the contractual limitation found in the policy. In the instant case this was not done until the answer

and cross-bill was filed on October 16, 1922, which was after the one year had elapsed in any view of the date of issue of the policy.' ” *Thistle vs. Equitable Life Assur. Soc.*, 261 S. W. (Tenn.) 667, 668 (1924). See also *Jefferson Standard Life Ins. Co. vs. McIntyre*, *supra*; *Humpston vs. State Mutual Life Assur. Co.*, 256 S. W. (Tenn.) 438; *Great Western Life Ins. Co. vs. Snively*, 206 Fed. 20; *Dibble vs. Reliance Life Ins. Co.*, 170 Cal. 199, 149 Pac. 171; *Weil vs. Federal Life Ins. Co.*, 264 Ill. 425; *Reagan vs. Union M. L. Ins. Co.*, 189 Mass. 555, 76 N. E. 217; *Flanigan vs. Federal Life Ins. Co.*, 231 Ill. 399, 83 N. E. 178; *Mutual Life Ins. Co. vs. New*, 125 La. 41, 51 So. 61; *Central Law Journal*, Vol. 97, No. 3, p. 40.

It is true that the cases are not entirely uniform as to what affirmative action must be taken by the insurer in order to exempt it from the incontestability clause found in policies of life insurance. Some of the cases hold that this step must be by court action. Still other cases that it may be either by court action or other “affirmative” action. There is but the one exception, the *Rose* case, which holds that rescission may be had by act of the insurer (called by Bigelow “rescission *in pais*”), and when so taken by the insurer against the [149] assured on the ground of fraud prior to the elapsation of the first year of the policy it renders available to the insurer either a suit in equity for cancellation or the defense of fraud in an action at law by the beneficiary, even though said suit be filed or action brought after the elapsation of such

period. All the cases are unanimous, however, in holding that mere denial of liability is not sufficient. No difficulty is encountered in appreciating the reason underlying those decisions which hold that court action is necessary. If in an action brought by the beneficiary the insurer answers prior to the expiration of the first year of the policy, any defense of which the answer is capable is available to it irrespective of whether final judgment is entered during or after the expiration of the first year of the policy, the judgment operating as of the date of the filing of the answer, and, if fraud be found, determining the legal existence of the contract within the first year of the life of the policy. Similarly in the event of suit in equity brought by the insurer during the first year of the policy for rescission of the policy on the ground of fraud. A decree of cancellation operates as of the date that suit is filed and serves to cancel the policy *ab initio*. Hence, by the decree of cancellation in equity the contract of insurance will have been set aside within the first year of its life after which it would be of no further force or effect. In other words, in either event, that is, by a judgment at law against the beneficiary upon the defense of fraud or by a decree in equity of cancellation, the legal existence of the policy is judicially determined during and prior to the expiration of the first year of the policy. This is none the less true, even though the beneficiary delayed action at law until the expiration of the first year of the policy. If the insurer had previously and during the first year of

the policy [150] brought a suit for cancellation, a court of equity having acquired jurisdiction would retain it until decree and the action at law would necessarily abate and await the final determination of the suit in equity.

The same theory is involved in the event of rescission by act of the insurer (decided in the Rose case), that is, that rescission by act of the defrauded party operates to forthwith cancel the policy *ab initio*.

The majority rely for their conclusion upon the Rose case. But the Rose case does not decide that the mere denial of liability by the insurer is a "contest." On the contrary, it decides that rescission taken by the insurer against the insured (rescission *in pais*) cancels the policy as of the date of rescission and if accomplished within the first year of the policy exempts the insurer from the application of the one-year incontestability clause. The majority lack the support of any authority for their conclusion that a mere denial of liability by the insurer during the first year of the policy exempts it from the application of a one-year incontestability clause. And even assuming, but not deciding, that the legal effect of rescission *in pais* as decided by the Rose case is to cancel the policy forthwith, then the facts in the Rose case furnish an example of "affirmative" action which some of the authorities say the insurer in order to be exempt from the provisions of an incontestability clause must take prior to such clause coming into effect and may with "actions in court," be included in the steps, the imme-



diate or ultimate legal effect of which is to cancel the policy within the first year of its life or to render it within that time of no further effect. But whether rescission by action of the insurer prior to the [151] incontestability clause coming into effect exempts the insurer from its application is not involved in the instant case for the reason that the acts of the insurer of April 7, 1923, did not amount to a rescission of the policy, rendering the Rose case inapplicable.

It is fundamental that rescission may be had against the fraudulent party to the contract or his legal representatives. "Inasmuch as the right of rescinding a voidable contract is alternative and coextensive with the right of affirming it, it follows that a voidable contract may be avoided by or against the personal representatives of the contracting parties." Wald's Pollock on Contracts, marg. p. 582, top p. 712. Whatever premiums were repayable to effect rescission were payable to the assured or his personal representatives. "The premium if returnable is due to the assured." 3 Joyce on Insurance, sec. 1428. " \* \* \* She" (the beneficiary) "had \* \* \* not the title to support an action of law upon it in her own name against the defendants or for the recovery of the premiums paid by her husband" (the assured). McDonald vs. Metropolitan Life Ins. Co., 38 Atl. (N. H.) 500, 501. There is no privity between the beneficiary and the assured. "Beneficiaries of a life insurance contract have, upon the repudiation of the policy by the company, no such interest in it

that enables them to recover the premiums paid, that right being invested in the insured.” 3 Joyce on Insurance, sec. 1428a. The beneficiary upon the death of the insured becomes vested with a legal demand against the insurer for the amount of the policy. “ \* \* \* by the death of the *cestui que vie* the obligation to pay as expressed in the policies became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the [152] required proof furnished, the obligation to pay certainly became fixed by the terms of the policies and the sums insured became a purely legal demand \* \* \* .” Insurance Co. vs. Bailey 13 Wall. (U. S.) 616, 622.

In the instant case the offer of the return of the premium was made to the beneficiary. It does not appear that she was in any way connected with the estate of the deceased assured. Nor does it appear that during the first year of the policy there was no legal representative of the estate of the assured upon whom tender of the premium might have been made. The offer to return the premium paid by the assured might as well have been made to a stranger. The burden of showing that there was no legal representative upon whom tender could be made devolved upon the insurer and not the beneficiary. It is upon the insurer and not the insured to show that it was wholly or partially exempted from the time limitation of the incontestability clause by reason of the absence of a legal representative of the assured. The majority say, “It is far from clear that a ten-

der of the premium was necessary in the case at bar to constitute a rescission *in pais*." How can a rescission *in pais* be accomplished without an offer by the defrauded party to return to the fraudulent party the consideration received by the former under the alleged fraudulent contract? The defrauded party must rescind within a reasonable time after the discovery of the fraud or he will be taken as having affirmed the fraudulent contract. And how can rescission be had against a third party—a mere volunteer—for whose benefit the contract was made? Unquestionably the rights of the beneficiary depend upon the integrity of the insurance contract. But rescission must be taken against the fraudulent party (assured) or his legal representative. Nor [153] that the defrauded party was "anxious to return the premium to the person entitled to it" can it be said that rescission was thereby accomplished.

In the case of *Oplinger vs. N. Y. Life Ins. Co.*, 98 Atl. (Pa.) 568, a policy of insurance was issued by the insurer to Allen A. Oplinger on February 24, 1913, in which the assured's wife was named as beneficiary. The assured died in January, 1914. On January 22, 1914, the defendant company notified the beneficiary that it rescinded the contract of insurance on the grounds of fraudulent representations and concealment of material facts by the assured. At the same time it tendered a return of the premiums, which tender was refused. Suit was then brought by the beneficiary. The defendant averred the rescission of the contract and paid

the amount of the tender into court. As to the effect of the alleged rescission of the contract the trial judge ruled: "If this rescission had been dated the 22d day of January, 1913, instead of 1914, and Allen Oplinger had still been living \* \* \* a different question would be presented, and it would be my duty to charge you \* \* \* as to the effect of a rescission; but \* \* \* Mr. Oplinger being dead the case must be tried by us just as if there had not been this formal rescission and as if they (the insurance company) were defending \* \* \* in the first instance on the ground of fraudulent representations and concealments." The appellate division affirmed the judgment of the trial court, and in commenting upon this instruction said: "We see no error in the legal attitude thus assumed by the court below. After the death of the insured the defendant company could not change the status of the beneficiary by an attempted rescission of the insurance contract." In the case of *Ramsay vs. Old Colony Life Ins. Co.*, *supra*, the Court said: "The appellant's right of action to contest [154] the validity of the policy was necessarily in abeyance after the death of the insured until the appointment of an administrator. There was no person in existence to be sued, the estate of the insured being the beneficiary in the policy, until such appointment. There was no person to whom the company could tender the premiums which it had received or against whom it could proceed for the cancellation of the policy."

The conclusion is inevitable that the insurer by its acts of April 7, 1923, did not effect a rescission of its policy. It is admitted that no other action was taken by it during the first year of the policy. Hence the interposition of fraud by the insurer during the incontestable period has for its sole justification the mere refusal by it to pay the beneficiary the amount of the policy upon the ground of fraud. This, in the opinion of the majority, was enough, and their opinion proceeds upon the theory that the insurer being by the terms of the policy prohibited from contesting it after the elapsation of the first year of the policy it may by implication "contest" the policy during the first year; that the denial of liability on the ground of fraud is a "contest"; that the insurance company inaugurated a "contest" within the first year of the policy and hence the incontestability clause does not apply. The word "contest," however, nowhere appears in the policy. The policy provides that it shall be "incontestable" after the elapsation of a certain period. It does not say that it shall be "incontestable" during one period and "contestable" during another. That is the inference of the majority. There is no necessity of interpretation. The incontestability clause is clear and unambiguous. We are only concerned with its meaning after it comes into operation and effect. It has no meaning [155] until the first year of the policy has elapsed and then only, for the purposes of the instant case, when an insurer defends or "contests" an action at law by the beneficiary



after the first year of the policy has elapsed, whereupon the sole question is of the jurisdiction of the contest in the face of the plain, clear, unequivocal and absolute inhibition of the incontestability clause.

But assuming that a denial of liability may be dignified by the term "contest," what is its effect? There is no question but that the insurer cannot contest after the elapsation of a year. What is there, then, in this mere denial of liability that renders inoperative the incontestability clause after the elapsation of the first year of the policy? To say that the denial of liability is a "contest" without showing wherein and how such contest exempts the insurance company from the application of the incontestability clause means absolutely nothing. The majority state that the rights of the insurer to contest during the first year of the policy "are as broad as they would have been if the clause of incontestability were not in the policy." Let us assume this to be true. Does this unlimited power of contestability during the first year of the policy, in the absence of an act of "contest," the immediate or ultimate legal effect of which is to neutralize the ensuing prohibition, detract one iota from the absolute prohibition against contest which becomes effective after this period of unlimited freedom has elapsed? To say that one may at one time perform an act prohibited at another time does not detract from the prohibition when effective. By mere denial of liability the policy is not canceled as by a decretal order of cancellation in equity.

By the mere denial of liability upon the ground of fraud the contract is not avoided and the defrauded party restored as upon rescission by the act of the defrauded [156] party, as held in the *Rose* case. Wherein does the mere denial of liability justify the interposition of the defense of fraud after the elapsation of a year in the face of the plain prohibition of the incontestability clause? For the insurer to say that it "contested" the policy within the first year of its life is not enough. It must show that it has done something prior to the expiration of the first year of the life of the policy, the immediate or ultimate legal effect of which is to exempt it from the prohibition of the incontestability clause, and failing this the incontestability clause operates to foreclose the defendant from the defense of fraud.

To hold that the mere denial of liability during the first year of the policy renders the incontestability clause of no application and permits the insurer to defend at any time against an action by the beneficiary seems to me to render the incontestability clause meaningless and of no effect and places the insured and beneficiary in the same position as though it were absent from the policy.

The judgment of the trial court should be affirmed.

E. C. PETERS. [157]

No. 1556. In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error to Circuit Court, First Circuit. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Petition for Rehearing. Rec'd and Filed in the Supreme Court Dec. 23, 1924, at 11:15 o'clock A. M. Robert Parker, Jr., Assistant Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff and Defendant in Error. [158]

[Title of Court and Cause.]

#### PETITION FOR REHEARING.

Now comes Chun Ngit Ngan, defendant in error in the above-entitled cause, and presents this petition for rehearing herein, and as grounds therefor sets forth as follows:

##### I.

That the keystone of the decision of the majority in the above-entitled matter is set forth in the following language in the decision:

“The rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incon-

testability after the lapse of two years from their issuance.”

## II.

That the foregoing statement of the rule is against the great weight of authority in this country.

## III.

That the point was decided without argument by counsel and without the matter having been so much as raised by the plaintiff in error and without the defendant in error [159] having an opportunity to present the law thereon.

## IV.

That the statute (S. L. 1917, Act 115, Sec. 50, Subd. 3) does not require the provisions inserted in the policy at issue in this cause, inasmuch as the requirement of the Statute is for any incontestability period not longer than two years and the selection by the company of a period of one year indicates its own choice and makes the policy subject to the usual rule that it shall be construed in favor of the insured or the insured's beneficiary regardless of what rule may be accepted by this Court as controlling when the clause is one artificially determined by statute law.

WHEREFORE, petitioner prays that she may have a rehearing in the above-entitled cause with an opportunity to present the law upon the foregoing rule adopted in the majority opinion without argument of counsel.

Dated Honolulu, T. H., this 23d day of December, A. D. 1924.

CHUN NGIT NGAN.  
THOMPSON, CATHCART & BEEBE.

By F. E. THOMPSON,  
Attorneys for Plaintiff and Defendant in Error.

Due service by copy of the within petition for rehearing is hereby admitted.

FREAR, PROSSER, ANDERSON &  
MARX,

M. F. P.

Attorneys for Defendant and Plaintiff in Error,  
Honolulu, Hawaii.

Dec. 23, 1924. [160]

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No. 1556. In the Supreme Court of the Territory of Hawaii. October, 1923, Term. Error to Circuit Court, First Circuit. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Amended Petition for Rehearing. Rec'd and Filed in the Supreme Court Dec. 29, 1924, at 3:45 o'clock P. M. Robert Parker, Jr., Assistant Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff and Defendant in Error. [161]



[Title of Court and Cause.]

### AMENDED PETITION FOR REHEARING.

Now comes Chun Ngit Ngan, defendant in error in the above-entitled cause, and presents this petition for rehearing herein, and as grounds therefor sets forth as follows:

#### I.

That the keystone of the decision of the majority in the above-entitled matter is set forth in the following language in the decision:

“The rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issuance.”

#### II.

That the foregoing statement of the rule is against the great weight of authority in this country. [162]

#### III.

That the point was decided without argument by counsel and without the matter having been so much as raised by the plaintiff in error and without the defendant in error having an opportunity to present the law thereon.

## IV.

That the Statute (S. L. 1917, Act 115, Sec. 50, Subd. 3) does not require the provision inserted in the policy at issue in this cause, inasmuch as the requirement of the Statute is for an incontestability period not longer than two years and the selection by the company of a period of one year indicates its own choice and makes the policy subject to the usual rule that it shall be construed in favor of the insured or the insured's beneficiary regardless of what rule may be accepted by this Court as controlling when the clause is one artificially determined by the statute law.

## V.

That it appears by the majority opinion of the Court that the decision was based upon the proposition that the usual rule of construction that the language of a policy is to be taken more strongly against the insurer is not applicable because of a standard form policy statute of the Territory. Yet it further appears that the majority opinion of the Court recognized that this rule should be applied in the case at bar when the opinion, under point three uses the following language:

“The clause of incontestability was doubtless drawn by the ablest lawyers available to insurance companies—men who know the English language well and who were aware of the ordinary definitions given to the words ‘incontestable,’ ‘Contestable’ and ‘contest’ in the dictionaries. When under these circumstances they

saw fit to provide simply that after a stated period the policy should be 'incontestable' [163] without specifying that within that period the policy would be contestable by judicial proceedings only, *ghe* inference is certainly of the strongest that no such limitation was intended upon the methods open to the company within the period for contesting the policy."

## VI.

That the decision herein is contradictory in that it rejects the rule that the policy shall be construed in favor of the insured or his beneficiary because of the insurance statute of the Territory and yet construes the policy under Section three of the majority opinion as having been drafted by the insurer and as containing the language which the insurer desired most to use.

WHEREFORE, petitioner prays that she may have a rehearing in the above-entitled cause with an opportunity to present the law upon the foregoing rule adopted in the majority opinion without argument of counsel.

Dated, Honolulu, T. H., this 29th day of December, A. D. 1924.

CHUN NGIT NGAN,  
THOMPSON, CATHCART & BEEBE,  
By MARGUERITE K. ASHFORD,  
Attorneys for Plaintiff and Defendant in Error.

I, Marguerite K. Ashford, certify that I have given careful study to the decision of the Court in the above-entitled cause; that I prepared amended petition for rehearing herein and that I am convinced that the grounds thereof are well taken.

Dated, Honolulu, T. H., this 29th day of December, —.

MARGUERITE K. ASHFORD.

Due service, by copy of the within amended petition for rehearing, is hereby admitted.

FREAR, PROSSER, ANDERSON &  
MARX,

M. F. P.,  
Attorneys for Defendant,  
Honolulu, Hawaii.

Dec. 29, 1924. [164]

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No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1924. Petition for Rehearing. Chun Ngit Ngan vs. The Prudential Insurance Company of America, a New Jersey Corporation. Opinion of the Supreme Court. Filed January 8, 1925, at 11:25 o'clock A. M. J. A. Thompson, Clerk. [165]

[Title of Court and Cause.]

OPINION OF SUPREME COURT ON PETITION FOR REHEARING.

Filed December 29, 1924.

Decided January 8, 1925.

PETERS, C. J., PERRY and LINDSAY, JJ.

Appeal and Error—Rehearing—Grounds—Opinion on immaterial point.

A rehearing will not be granted on the ground that the Court expressed an opinion upon a point not argued by counsel, when the point was not material to the decision of the case.

[166]

OPINION OF THE COURT BY PERRY, J.

(PETERS, C. J., Dissenting.)

The defendant in error moves for a rehearing on the ground that “the keystone of the decision” in this cause is contained in its statement that “the rule sometimes referred to in construing policies of insurance, that their language, because it was chosen by the insurer, is in case of ambiguity to be taken most strongly against the insurer is not applicable in this instance because there is a statute in this Territory requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issuance”; that this “statement of the rule is against the great weight of authority in this country”; that “the point was decided without argument by coun-



sel'' and without its having been raised by the plaintiff in error; that the statute (L. 1917, Act 115, Sec. 50, Subd. 3) did not require the insertion in the policy under consideration of the particular clause relating to incontestability there appearing; and that the decision "is contradictory in that it rejects the rule that the policy shall be construed in favor of the insured or his beneficiary because of the insurance statute of the Territory and yet construes the policy under section three of the majority opinion as having been drafted by the insurer and as containing the language which the insurer desired most to use."

In the opinion filed the conclusion of the majority was not based upon any ambiguity of the language used in the contract. No ambiguity was found in the clause relating to incontestability but on the contrary comment was made upon the uniformity of definition in the dictionaries of the leading words involved. For this reason, therefore, if for no other, the rule of construction [167] referred to in the petition for rehearing is inapplicable in the case at bar.

The prohibition of Section 2259, R. L. 1915, against the decision of points not argued by counsel is directed merely to points which are "material to the decision of the case." The question of whether or not the statute rendered the rule of construction inapplicable in case of ambiguity was not material to the decision of this case. A rehearing or reconsideration of the point could not possibly affect the

conclusion of the Court that the judgment appealed from must be reversed.

The petition is denied without argument, under the rule.

THOMPSON, CATHCART & BEEBE, for the  
Petition.

ANTONIO PERRY.

ALEXANDER LINDSAY, Jr.

[168]

#### DISSENTING OPINION OF PETERS, C. J.

Movant predicates her motion for a rehearing, not upon Rule 5 of this court but upon section 2259, R. L. 1915, which provides among other things that "after the argument of any cause, or when the same is submitted on briefs, if the Court is of opinion that a certain point or legal proposition is involved which is material to the decision of the case and which has not been raised or argued by counsel on either side, the case shall not be decided on such point or proposition until counsel for both sides have had an opportunity of arguing the same before the court." The movant in her brief contended that the language of the policy, being the language of the insurer, it should in case of ambiguity be taken most strongly against the insurer. The majority held that this rule was not applicable because of a territorial statute (L. 1917, c. 115, sec. 50, subd. 3) requiring the inclusion in all policies of life insurance of a clause providing for incontestability after the lapse of two years from their issu-

ance, citing the statute. Whether the language of the incontestability clause was ambiguous and what rules of construction should be applied thereto were material to the decision. That the majority held that the incontestability clause was not ambiguous is immaterial. It considered the point raised and rejoined thereto. The point being material its rejoinder was material. Moreover, its rejoinder was something entirely new. The statute requiring the inclusion in life insurance policies of an incontestability clause was not called to the attention of the Court by counsel either in their briefs or upon argument. It was a rejoinder resulting from the industry of the Court. Under the circumstances we have a clear case of a point involved which was material to the decision which had not been raised or argued by [169] counsel on either side. The statute is mandatory. The movant is entitled to a rehearing as a matter of right. The motion for a rehearing should be granted.

E. C. PETERS. [170]

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No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1923. Error. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Decision on Error. Filed January 12, 1925, at 3:35 P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald

Building, Honolulu, T. H., Attorneys for Plaintiff in Error. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Defendant in Error. [171]

[Title of Court and Cause.]

### DECISION ON WRIT OF ERROR.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed on the 11th day of December, 1924, the judgment theretofore entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, in favor of the plaintiff and against the defendant above named, is set aside and a new trial granted.

Dated at Honolulu, T. H., January 12, 1925.

By the Court.

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Approved.

A. PERRY,

Associate Justice. [172]

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No. 1556. In the Supreme Court of the Territory of Hawaii. October, Term, 1923. Error. Chun Ngit Ngan, Plaintiff and Defendant in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant and Plaintiff in Error. Notice of Decision on Error. Filed

January 12, 1925, at 3:35 P. M. J. A. Thompson, Clerk. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Plaintiff in Error. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Defendant in Error. [173]

[Title of Court and Cause.]

#### NOTICE OF DECISION ON WRIT OF ERROR.

To the Honorable Third Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

You will please take notice that in the above-entitled cause the Supreme Court has filed the following decision on error:

#### DECISION ON ERROR.

In the above-entitled cause, pursuant to an opinion of the above-entitled court filed on the 11th day of December, 1924, the Court ordered that the judgment theretofore entered in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in favor of the plaintiff and against the defendant, be set aside and a new trial granted.

Dated at Honolulu, T. H., January 12, 1925.

By the Court:

J. A. THOMPSON,  
Clerk of the Supreme Court of the Territory of Hawaii.



Dated at Honolulu, T. H., January 12, 1925.

By the Court.

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii. [174]

The foregoing notice is hereby approved as to the form thereof, and it is ordered that the same issue forthwith.

Dated Honolulu, T. H., January 12, 1925.

[Seal]

A. PERRY,

Associate Justice of the Supreme Court of the Territory of Hawaii. [175]

[Title of Court and Cause.]

#### STIPULATION RE RETRIAL.

It is hereby stipulated by and between the parties plaintiff and defendant above named that the above-entitled cause be presented to the Court, jury waived, upon the evidence heretofore presented upon the first trial of said cause, with the following additional evidence on defendant's behalf.

That Yuen Tai Kam, the insured named in the insurance policy the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan, surviving him, said father and widow being residents of the Territory of Hawaii.

That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to.

That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant's evidence relative to tender back of premiums paid [176] and demand for surrender of policy for cancellation; relative to fraud of insured in making application for the policy which is the subject matter of this action, and relative to probate proceedings in the estate of said Yuen Tai Kam, being admitted over plaintiff's objection that the same is incompetent, irrelevant and immaterial and plaintiff being allowed an exception.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the amount involved in the above-entitled action, exclusive of costs and attorneys' commissions, is in excess of \$5,000.00.

Dated, Honolulu, T. H., February 20th, 1925.

THOMPSON, CATHCART & BEEBE,

E. H. BEEBE,

Attorneys for Plaintiff.

FREAR, PROSSER, ANDERSON &

MARX,

M. F. P.,

Attorneys for Defendant.

[Endorsed]: Filed 2:05 P. M., Mar. 6, 1925.

[177]

[Title of Court and Cause.]

### DECISION.

On a new trial of the above-entitled cause, ordered by the Supreme Court of the Territory of Hawaii (28 Haw. 99, Case No. 1556), the parties to said action by their respective counsel have by written stipulation on file herein agreed as follows:

“It is hereby stipulated by and between the parties plaintiff and defendant above named that the above-entitled cause be presented to the Court, jury waived, upon the evidence heretofore presented upon the first trial of said cause, with the following additional evidence on defendant’s behalf.

That Yuen Tai Kam, the insured named in the insurance policy the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan, surviving him, said father and widow being residents of the Territory of Hawaii.

That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to.

That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant’s evi-

dence relative to tender back of premiums paid and demand for surrender of policy for cancellation; relative to [178] fraud of insured in making application for the policy which is the subject matter of this action, and relative to probate proceedings in the estate of said Yuen Tai Kam, being admitted over plaintiff's objection that the same is incompetent, irrelevant and immaterial and plaintiff being allowed an exception.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that the amount involved in the above-entitled action, exclusive of costs and attorneys' commissions, is in excess of \$5,000.00.

The record herein shows that this is a suit on an insurance policy issued by the Prudential Insurance Company of America on the 1st day of May, 1922.

The name of the insured was Yuen Tai Kam and the beneficiary is Chun Ngit Ngan, designated in the policy as the wife of the insured.

The amount of the insurance is \$5,000.00. It was admitted at the trial that the insured died on February 5th, 1923; that at the time of his death all premiums due under the policy of insurance had been paid; that the plaintiff is the beneficiary named in the policy, and that she was the wife of the insured; that due notice of the death of the insured was furnished the defendant under the provisions of the policy; that no court proceedings

were taken by the defendant to contest its liability under the policy within one year subsequent to its issuance.

Evidence was introduced by the defendant tending to show that at the time the insured made application for insurance, he made to the examining physician certain false and fraudulent statements concerning his physical condition and the state of his health, and I am of the opinion from this evidence that the insured thus practiced a fraud on the defendant and that if the insured had truthfully stated [179] to the examining physician his physical condition, the defendant would not have issued the policy. The policy of insurance contains the following provision: "This policy shall be incontestable after one year from its date, except for nonpayment of premium, but if the age of the insured be misstated the amount or amounts payable under this policy shall be such as the premium would have purchased at the correct age."

Before the expiration of one year from the date of the policy, and subsequent to the death of the insured, the defendant, thru its agents, called on the beneficiary at her home in Honolulu and tendered to her the full amount of the premiums that had been paid on the policy and demanded its return. The beneficiary declined to accept the premiums tendered to her and declined to surrender the policy.

It is the contention of the defendant that because of the fraud practiced on it by the insured, the



policy of insurance was void and that in thus tendering to the beneficiary the premiums that had been paid and demanding a return of the policy, the defendant contested the policy as it had a right to do.

The plaintiff, on the other hand, contends that the defendant could only have contested the policy on the ground of fraud by instituting, within one year from its date, some appropriate legal proceeding challenging its validity and that merely tendering to the beneficiary the premiums that had been paid and demanding a return of the policy were not a contest within the meaning of the law.

The Supreme Court having settled the law of this case, [180] 28 Haw. 99, says:

“When an insurance company within one year from the date of the issuance of a policy notifies the sole beneficiary, the insured being dead, that the policy was obtained by the fraud of the assured, that it repudiates the policy on account of the fraud and that it is willing to return the amount of the first premium received by it and demands the return of the policy, it may in an action brought by the beneficiary after the expiration of one year to recover the amount of the policy defend on the ground that the policy was obtained by fraud, even though the policy contains a clause that it shall be incontestable after one year from its date of issue and even though the company did not within the period of one year institute

judicial proceedings to cancel the policy on the ground of fraud.”

Judgment will therefore be entered for the defendant, with costs to be taxed against plaintiff herein.

Dated at Honolulu, T. H., this 21st day of March, 1925.

[Seal] FRANK ANDRADE,  
First Judge, Circuit Court, First Judicial Circuit,  
Territory of Hawaii.

[Endorsed]: Filed 11:25 o'clock A. M., March 21st, 1925. [181]

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[Title of Court and Cause.]

### EXCEPTION TO DECISION.

Now comes Chun Ngit Ngan, plaintiff herein, and notes its exception to the decision of the Court entered herein upon the ground that it is contrary to the law and evidence and the weight of the evidence.

Dated Honolulu, T. H., this 28 day of March, 1925.

CHUN NGIT NGAN,  
Plaintiff Herein.  
THOMPSON, CATHCART & BEEBE,  
By MARGUERITE K. ASHFORD,  
Her Attorneys.

Approved.

FRANK ANDRADE, (Seal)  
Judge of the Above-entitled Court.

[Endorsed]: Filed at 9:10 o'clock, A. M., Mar. 30, 1925. [182]

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In the Circuit Court of the First Judicial Circuit,  
Territory of Hawaii.

LAW—No. 10,307.

CHUN NGIT NGAN,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant.

### JUDGMENT.

This action by petition claiming Five Thousand Dollars (\$5,000), together with interest, costs and attorneys' commissions, as damages, came to the present term of this court when the parties appeared and were at issue to the Court, jury having been waived. Said cause having been heard the Court finds in favor of the defendant.

THEREFORE, IT IS ADJUDGED that the defendant recover of the plaintiff its costs at \$213.78 and that defendant have execution therefor.

By the Court.

[Seal]

H. A. WILDER,

Clerk of the First Judicial Circuit, Territory of  
Hawaii.

Entered this 31st day of March, 1925.

O. K. as to form.

THOMPSON, CATHCART & BEEBE,  
Per E. H. B.,  
Attys. for Pltff.

[Endorsed]: Filed Mar. 31, 1925, at 11:50 A. M.  
[183]

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[Title of Court and Cause.]

EXCEPTION TO JUDGMENT.

Now comes Chun Ngit Ngan, plaintiff in the above-entitled cause, by Thompson, Cathcart & Beebe, her attorneys, and hereby excepts to the judgment heretofore entered herein on th 31st day of March, A. D. 1925, in favor of the Prudential Insurance Company of America, a New Jersey corporation, defendant and against the plaintiff herein.

Dated, Honolulu, T. H., this 1st day of April, A. D. 1925.

CHUN NGIT NGAN,  
Plaintiff Above Named.  
THOMPSON, CATHCART & BEEBE,  
By E. H. BEEBE,  
Her Attorneys.

Allowed.

FRANK ANDRADE, (Seal)  
Judge of the Above-entitled Court.

[Endorsed]: Filed at 3:10 o'clock P. M., April 1, 1925. [184]

[Title of Court and Cause.]

### APPLICATION FOR WRIT OF ERROR.

To the Clerk of the Supreme Court:

Please issue a writ of error in the above-entitled case to the Clerk of the Circuit Court of the First Judicial Circuit on behalf of said Chun Ngit Ngan, plaintiff in error, returnable to the Supreme Court of the Territory of Hawaii.

CHUN NGIT NGAN,  
Plaintiff in Error Above Named.  
By E. H. BEEBE,  
Her Attorneys. [185]

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[Title of Court and Cause.]

### ASSIGNMENT OF ERRORS.

Now comes Chun Ngit Ngan, plaintiff in error above named and petitioner for a writ of error in the above-entitled cause, and says that in the records, proceedings, judgments, decisions, ruling, orders and final judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in an action lately pending in said Circuit Court, wherein your petitioner was and is plaintiff and said The Prudential Insurance Company of America, a New Jersey corporation, was and is defendant, there is manifest, material and prejudicial error, and petitioner herein now makes, files and presents the following assignment of errors upon which she relies, as follows, to wit:



ASSIGNMENT OF ERROR No. 1.

Error in the admission of the following evidence over the objections and exception of plaintiff (Stipulation of date, February 20th, 1925):

“The evidence heretofore presented upon the first trial of said cause, with the following additional evidence on defendant’s behalf;

That Yuen Tai Kam, the insured named in insurance policy the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan, surviving him, said father and widow being residents of the Territory of Hawaii. [186]

That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to.

That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant’s evidence relative to tender back of premiums paid and demand for surrender of policy for cancellation; relative to fraud of insured in making application for the policy which is the subject matter of this action, and relative to probate proceedings in the estate of said Yuen Tai Kam,”

## ASSIGNMENT OF ERROR No. 2.

The Court erred in finding that the insured practised a fraud upon the defendant and defendant in error.

## ASSIGNMENT OF ERROR No. 3.

The Court erred in finding that the insured did not truthfully state to the examining physician his physical condition.

## ASSIGNMENT OF ERROR No. 4.

The Court erred in finding that the defendant and defendant in error would not have issued the policy if the insured had truthfully stated to the examining physician his physical condition.

## ASSIGNMENT OF ERROR No. 5.

The Court erred in holding that the Supreme Court had settled the law of this case; 28 Haw. 99, saying:

“When an insurance company within one year from the date of the issuance of a policy notifies the sole beneficiary, the insured being dead, that the policy was obtained by the fraud of the assured, that it repudiates the policy on account of the fraud and that it is willing to return the amount of the first premium received by it and demands the return of the policy, it may in an action brought by the beneficiary after the expiration of one year to recover the amount of the policy defend on the ground that the policy was obtained by fraud,

even though the policy contains a clause that it shall be incontestable after one year from its date of issue and even though the company did not within the period of one year institute judicial proceedings to cancel the policy on the ground of fraud.” [187]

ASSIGNMENT OF ERROR No. 6.

The Court erred in rendering and entering its decision herein.

ASSIGNMENT OF ERROR No. 7.

The Court erred in directing judgment herein to be entered for the defendant and defendant in error.

ASSIGNMENT OF ERROR No. 8.

Error in the entry of judgment as follows:

“This action by petition claiming Five Thousand Dollars (\$5,000), together with interest, costs and attorneys’ commission, as damages, came to the present term of this court when the parties appeared and were at issue to the Court, jury having been waived. Said cause having been heard the Court finds in favor of the defendant.

THEREFORE, IT IS ADJUDGED that the defendant recover of the plaintiff its costs taxed at \$213.78 and that defendant have execution therefor.

By the Court:

(S.) H. A. WILDER,  
Clerk of the First Judicial Circuit, Territory  
of Hawaii.

Entered this 31 day of Mar., 1925.”

## ASSIGNMENT OF ERROR No. 9.

Error in the taxation of costs in favor of defendant and defendant in error and against plaintiff and plaintiff in error.

Dated, Honolulu, T. H., this 1st day of April A. D. 1925.

CHUN NGIT NGAN,  
Plaintiff and Plaintiff in Error.

THOMPSON, CATHCART & BEEBE,  
By E. H. BEEBE,  
Her Attorneys. [188]

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No. 1612. In the Supreme Court of the Territory of Hawaii. Error No. 1612. From Circuit Court First Circuit. Judge Frank Andrade. Chun Ngit Ngan, Plaintiff in Error vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Writ of Error and Return. Filed April 2, 1925, at 2:33 P. M. and issued same. J. A. Thompson, Clerk. Received April 2, 1925, 3 P. M. Henry Smith, Chief Clerk, Circuit Court First Jud. Circuit, Ter. Haw. Returned April 14, 1925, at 3:25 P. M. Robert Parker, Jr., Assistant Clerk. [189]

[Title of Court and Cause.]

WRIT OF ERROR.

The Territory of Hawaii:

To the Clerk of the Circuit Court of the First  
Judicial Circuit, Territory of Hawaii.

Application having been made on behalf of said  
Chun Ngit Ngan, plaintiff in error above named,  
for writ of error in the above-entitled case, you are  
commanded forthwith to send to the Supreme Court  
the record in the above case.

WITNESS the Honorable EMIL C. PETERS,  
Chief Justice of the Supreme Court of the Terri-  
tory of Hawaii, this 2d day of April, A. D. 1925.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court. [190]

[Title of Court and Cause.]

RETURN OF CLERK TO WRIT OF ERROR.

To the Clerk of the Supreme Court:

The execution of the within writ of error appears  
by the record hereto attached.

Dated, Honolulu, T. H., this 14 day of April,  
A. D. 1925.

HENRY SMITH,

Clerk of the Circuit Court of the First Judicial  
Circuit, Territory of Hawaii. [191]

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In the Supreme Court of the Territory of Hawaii.  
Error No. 1612. From Circuit Court, First Circuit.  
Judge Andrade. Chun Ngit Ngan, Plaintiff in



Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Bond on Writ of Error. Filed April 2, 1925, at 2:30 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, Honolulu, T. H., Attorneys for Defendant in Error. [192]

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[Title of Court and Cause.]

### BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That Chun Ngit Ngan, as principal, and the United States Fidelity and Guaranty Company, are held and firmly bound unto the Prudential Insurance Company of America, a New Jersey corporation, defendant in error above named, and its successors and assigns, in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States, for the payment of which well and truly to be made, we bind our heirs, executors, administrators, successors and assigns, jointly, severally and firmly, by these presents.

Sealed with our seals, and dated this 2d day of April, 1925.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT:

WHEREAS, the said The Prudential Insurance Company of America, a New Jersey corporation, defendant in error, above named, did recover a

judgment against the above bonded, Chun Ngit Ngan, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on the 31st day of March, A. D. 1925, in words and figures as follows:

“JUDGMENT.

This action by petition claiming Five Thousand Dollars (\$5,000), together with interest, costs and attorneys’ [193] commissions, as damages, came to the present term of this court when the parties appeared and were at issue to the Court, jury having been waived. Said cause having been heard the Court finds in favor of the defendant.

THEREFORE, IT IS ADJUDGED that the defendant recover of the plaintiff its costs taxed at \$213.78 and that defendant have execution therefor.

By the Court.

(S.) H. A. WILDER,  
Clerk of the First Judicial Circuit, Territory of  
Hawaii.

Entered this 31st day of Mar., 1925.”

From which said judgment the said named principal obligor has prosecuted a writ of error from the Supreme Court of the Territory of Hawaii to said Circuit Court.

NOW, THEREFORE, if the said Chun Ngit Ngan, principal obligor above-named, shall pay the judgment in said original cause in case of failure to sustain the writ of error, then the above obliga-

tion to be void; otherwise to remain in full force and virtue.

CHUN NGIT NGAN,  
Principal.

UNITED STATES FIDELITY & GUAR-  
ANTY COMPANY, (Seal)

By EDWIN BENNER,  
Its Attorney-in-Fact.  
Surety.

O. K.—FREAR, PROSSER, ANDERSON &  
MARX.

P.

[Endorsed]: Filed at 3:05 o'clock P. M., April 2,  
1925. [194]

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[Title of Court and Cause.]

# NOTICE OF ISSUANCE OF WRIT OF ERROR.

To the Above-named, the Defendant in Error, and to  
Messrs. Frear, Prosser, Anderson & Marx, Its  
Attorneys.

You and each of you will please take notice that a writ of error has issued from the Supreme Court of the Territory of Hawaii to the Circuit Court of the First Judicial Circuit, said Territory, in the action lately pending, in which the Prudential Insurance Company of America, a New Jersey corporation, was defendant and Chun Ngit Ngan was

plaintiff, numbered and docketed in said court as Law Number 10307.

Dated, this 1st day of April A. D. 1925.

CHUN NGIT NGAN,  
Plaintiff and Plaintiff in Error,  
THOMPSON, CATHCART & BEEBE,  
By E. H. BEEBE,  
Her Attorneys. [195]

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[Title of Court and Cause.]

#### PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Circuit Court of the First  
Judicial Circuit, Territory of Hawaii:

Pursuant to the writ of error issued in the above-entitled cause, you are hereby directed to transmit to the Supreme Court of the Territory of Hawaii, the record in the above-entitled cause including the documents hereinafter referred to:

1. Stipulation of February 20th, 1925, re evidence.
2. Decision.
3. Exception to decision.
4. Bill of costs.
5. Exception to bill of costs.
6. Judgment.
7. Exception to judgment.
8. The record upon former writ of error in this cause.

Dated, Honolulu, T. H., this 1st day of April, 1925.

CHUN NGIT NGAN,  
Plaintiff in Error Above Named.  
THOMPSON, CATHCART & BEEBE,  
By E. H. BEEBE,  
Her Attorneys. [196]

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No. 1612. In the Supreme Court of the Territory of Hawaii. October Term, 1924. Error to Circuit Court, First Circuit, Hon. F. Andrade, Presiding. Chun Ngit Ngan, vs. The Prudential Insurance Company of America, a New Jersey Corporation. Opinion of the Supreme Court. Filed May 11, 1925 at 3:10 o'clock P. M. J. A. Thompson, Clerk. [197]

[Title of Court and Cause.]

Error to Circuit Court, First Circuit.

Hon. F. ANDRADE, Judge.

Submitted May 9, 1925.

Decided May 11, 1925.

PETERS, C. J., PERRY and LINDSAY, JJ.

Decided upon the authority of Chun Ngit Ngan vs. Prudential Insurance Co., *ante*, 99.

Affirmed. [198]

OPINION OF THE COURT BY PERRY, J.

(PETERS, C. J., Dissenting.)

The prior history of this case is recited in our opinion reported *ante*, 99. The first judgment was



set aside and a new trial granted. At the second trial, by stipulation of the parties, the cause was presented to the Court, jury waived, upon the evidence adduced at the first trial together with the following additional evidence on defendant's behalf:

"That Yuen Tai Kam, the insured named in the insurance policy, the subject matter of this action, died intestate, without issue, his father, Jim Jan, and his widow, plaintiff herein, Chun Ngit Ngan surviving him, said father and widow being residents of the Territory of Hawaii;

"That Chun Ngit Ngan, his widow, is the person named as beneficiary in the policy of insurance referred to;

"That on April 11, 1923, a petition for the appointment of an administrator of the estate of Yuen Tai Kam was filed in the Circuit Court of the First Circuit, Territory of Hawaii, and that thereafter and on the 29th day of May, 1923, administrators of said estate were duly appointed and qualified as such; defendant's evidence relative to tender back of premiums paid and demand for surrender of policy for cancellation, relative to fraud of insured in making application for the policy which is the subject matter of this action and relative to probate proceedings in the estate of said Yuen Tai Kam, being admitted over plaintiff's objection that the same is incompetent, irrelevant and immaterial."

Following our prior opinion the trial court thereupon entered judgment for the defendant. From

that second judgment the case comes to this court on a writ of error. [199]

In addition to relying upon its former briefs and the former opinion of this Court, the insurance company now presents the following contentions: (1) that "the notice by the insurer to Chun Ngit Ngan of the repudiation of the policy, tender to her of the premium paid and demand for return of the policy was a rescission of such policy and therefore a contest thereof" and (2) that "the insurer herein contested the policy sued upon by judicial action within the period of contestability allowed by the policy," due to the fact, as it is further contended, that the time elapsing from the date of the death of insured to the date of the appointment of the administrators should not be considered as a part of the period of one year referred to in the clause of incontestability.

We deem it to be unnecessary to consider either of these contentions. Upon the reasoning contained in our former opinion, the judgment for the defendant is affirmed.

THOMPSON, CATHCART & BEEBE, for Plaintiff in Error.

FREAR, PROSSER, ANDERSON & MARX and  
A. E. STEADMAN, for Defendant in Error.

ANTONIO PERRY,  
ALEXANDER LINDSAY, Jr. [200]

#### DISSENTING OPINION OF PETERS, C. J.

Nothing has been called to my attention to cause me to doubt the conclusions that I heretofore

reached upon the former hearing. Under the circumstances I respectfully dissent from the majority.

E. C. PETERS. [201]

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No. 1612. In the Supreme Court of the Territory of Hawaii. Error to Circuit Court, First Circuit. Judge Frank Andrade, Presiding. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Filed May 12, 1925, at 10:55 o'clock A. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [202]

No. 1612.

In the Supreme Court of the Territory of Hawaii.  
Error to Circuit Court, First Circuit.

Judge FRANK ANDRADE, Presiding.

CHUN NGIT NGAN,

Plaintiff in Error,

vs.

THE PRUDENTIAL INSURANCE COMPANY  
OF AMERICA, a New Jersey Corporation,  
Defendant in Error.

### JUDGMENT ON WRIT OF ERROR.

In the above-entitled cause, pursuant to the opinion of the above Court rendered and filed on the

11th day of May, A. D. 1925, the judgment for defendant is affirmed.

Dated, Honolulu, T. H., May 12, 1925.

By the Court:

[Seal]

J. A. THOMPSON,  
Clerk of the Supreme Court.

Approved.

E. C. PETERS,  
Chief Justice, Supreme Court, Territory of Hawaii.  
[203]

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In the Supreme Court of the Territory of Hawaii.  
Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Bond on Writ of Error. Filed June 30, 1925, at 2:50 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error.  
[204]

[Title of Court and Cause.]

### BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS:  
That Chun Ngit Ngan, as principal, and United States Fidelity and Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto The Prudential Insurance Company of America, a New Jersey corporation, in the penal

sum of Five Hundred Dollars (\$500.00), for the payment of which, well and truly to be made to said The Prudential Insurance Company of America, a New Jersey corporation, we bind ourselves and our respective heirs, executors, administrators, successors and assigns firmly by these presents.

THE CONDITION of the above obligation is such that,—

WHEREAS, on the 30th day of June, 1925, the above bounden principal sued out a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit from that certain judgment made and entered in the above-entitled court and cause on the 12th day of May, 1925, by the Supreme Court of the Territory of Hawaii.

NOW, THEREFORE, if the said principal shall prosecute her said writ of error to effect and answer all damages and costs if she fails to sustain her writ of error, then this [205] obligation shall be void; otherwise it shall remain in full force and effect.

IN WITNESS WHEREOF the said Chun Ngit Ngan, principal, has hereunto set her hand and United States Fidelity and Guaranty Company of Baltimore, Maryland, has caused this instrument



to be executed and its seal hereon impressed this 30th day of June, 1925.

CHUN NGIT NGAN,

Principal.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY OF BALTI-  
MORE, MARYLAND,

Surety.

[Seal]

By HERMAN LUIS,

Its Attorney-in-fact.

The foregoing bond is approved.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Terri-  
tory of Hawaii. [206]

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In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Petition for Writ of Error. Filed June 30, 1925, at 2:50 P. M. and issued for service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [207]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Chun Ngit Ngan, plaintiff and petitioner in the above-entitled cause, deeming herself aggrieved by the decision and judgment in said cause, affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, which judgment of the Supreme Court of the Territory of Hawaii was made and entered upon the 12th day of May, 1925, and claiming that there are manifest errors to the damage of the petitioner in the same, which errors are specifically set forth in assignment of errors filed herewith, to which reference is hereby made, now comes by Thompson, Cathcart & Beebe, her attorneys, and respectfully prays that a writ of error be allowed her in the above-entitled cause and that she be allowed to prosecute the same to the United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided; that an order be made fixing the amount of [208] security the petitioner shall give, and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send to the United States Circuit Court for the Ninth Circuit a transcript of the record, proceedings, exhibits and papers in this cause, duly

authenticated, for the correction of the errors so complained of, and that a citation may issue.

And in this behalf the petitioner shows that the said judgment was rendered in an action at law, and that the amount involved in said action, exclusive of costs, exceeds the sum or value of Five Thousand Dollars.

Dated at Honolulu, T. H., this 23d day of June, 1925.

CHUN NGIT NGAN,  
Petitioner.  
By THOMPSON, CATHCART & BEEBE,  
Her Attorneys.

City and County of Honolulu,  
Territory of Hawaii,  
United States of America,—ss.

Frank E. Thompson, being first duly sworn, on oath deposes and says: That he is a member of the firm of Thompson, Cathcart & Beebe, the attorneys for the above-named petitioner, Chun Ngit Ngan; that he has read the foregoing petition and knows its contents and that the matters and things therein set forth are true of his own knowledge, and further that the amount [209] involved in the cause aforesaid, exclusive of costs, exceeds the sum of Five Thousand Dollars.

FRANK E. THOMPSON.

Subscribed and sworn to before me this 23d day of June, A. D. 1925.

[Seal] ALMA S. HERMANSON,  
Notary Public, First Judicial Circuit, Territory  
of Hawaii.

The foregoing petition is granted, a writ of error allowed, and bond on said writ of error is fixed at \$500.

Dated June 30, 1925.

[Seal]

E. C. PETERS,  
Chief Justice. [210]

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In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Acknowledgment of Service. Filed June 30, 1925, at 3:40 P. M. J. A. Thompson, Clerk. [211]

[Title of Court and Cause.]

#### ACKNOWLEDGMENT OF SERVICE.

Service and receipt of a copy of the petition for writ of error, the assignment of errors, the writ of error, and the citation on writ of error in the proceeding upon writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the Supreme Court of the Territory of Hawaii, in the above-entitled cause, is hereby acknowledged this 30th day of June, 1925.

FREAR, PROSSER, ANDERSON & MARX,  
Attorneys for The Prudential Insurance Company  
of America, a New Jersey Corporation.

By M. F. PROSSER. [212]

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In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jer-

sey Corporation, Defendant in Error. Amended Praecipe. Filed July 10, 1925, at 11:15 A. M. J. A. Thompson, Clerk. Thompson, Carthcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [213]

[Title of Court and Cause.]

AMENDED PRAECIPE FOR TRANSCRIPT  
OF RECORD.

To James A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, opinions, judgments and papers on file in said cause, to wit:

A. In record No. 1556:

1. Copy of amended complaint dated November 8, 1923.
2. Copy of amended answer to said amended complaint, dated and filed January 5, 1924.
3. Copy of decision of Circuit Judge Banks filed May 10, 1924.
4. Copy of judgment of the Circuit Court, First Circuit, entered May 12, 1924.
5. Copy of exception by defendant to decision and judgment filed May 13, 1924.
6. Copy of Reporter's transcript of the evidence. [214]



7. Copy of Plaintiff's Exhibit "A."
8. Copy of Defendant's Exhibit 1.
9. Copy of Defendant's Exhibit 2.
10. Copy of Defendant's Exhibit 3.
11. Copy of Defendant's Exhibit 4.
12. Copy of Defendant's Exhibit 5.
13. Copy of Defendant's Exhibit 6.
14. Copy of Defendant's Exhibit 7.
15. Copy of minutes of the Clerk, Circuit Court, First Circuit.
16. Copy of application for writ of error of the plaintiff, dated May 19, 1924.
17. Copy of assignment of errors, dated May 19, 1924.
18. Copy of bond on writ of error dated May 19, 1924, for the sum of \$6,000.00. The Prudential Insurance Company of America, principal; National Security Company, surety, and Chun Ngit Ngan, obligee.
19. Copy of writ of error, dated May 19, 1924.
20. Copy of return to writ of error dated June 23, 1924.
21. Copy of notice of issuance of writ of error, dated May 19, 1924.
22. Copy of praecipe, dated May 19, 1924.
23. Copy of opinion of the Supreme Court of the Territory of Hawaii of December 11, 1924, reported in Volume 28 Hawaii Reports, pages 99-144.
24. Copy of petition for a rehearing dated December 23, 1924.

25. Copy of amended petition for a rehearing dated December 29, 1924.
26. Copy of opinion of the Supreme Court of the Territory of Hawaii on petition for rehearing dated [215] January 8, 1925, reported in Volume 28, Hawaii Reports, pages 157-159.
27. Copy of decision on writ of error, dated January 12, 1925.
28. Copy of notice of decision on writ of error, dated January 12, 1925.

B. In record No. 1612:

29. Copy of stipulation of February 20, 1925, *re* evidence.
30. Copy of decision of Circuit Judge Andrade of March 21, 1925.
31. Copy of exception by plaintiff to decision filed March 30, 1925.
32. Copy of judgment of the Circuit Court, First Circuit, filed March 31, 1925.
33. Copy of exception by plaintiff to judgment of March 31, 1925, filed April 1, 1925.
34. Copy of application for writ of error of the plaintiff, dated April 1, 1925.
35. Copy of assignment of errors, dated April 1, 1925.
36. Copy of writ of error, dated April 2, 1925.
37. Copy of return of clerk to writ of error, dated April 14, 1925.
38. Copy of bond on writ of error dated April 2, 1925, for the sum of \$500.00 Chun Ngit

Ngan, principal; United States Fidelity and Guaranty Company, surety, and The Prudential Insurance Company of America, a New Jersey corporation, obligee. [216]

39. Copy of notice of issuance of writ of error, dated April 1, 1925.
40. Copy of praecipe, dated April 1, 1925.
41. Copy of opinion of the Supreme Court of the Territory of Hawaii, dated May 11, 1925, reported in Volume 28, Hawaii Reports, pages 392-394.
42. Copy of judgment of the Supreme Court of the Territory of Hawaii entered and filed May 12, 1925.
43. Copy of the bond on writ of error, dated June 30, 1925, for the sum of \$500.00, Chun Ngit Ngan, principal, United States Fidelity and Guaranty Company of Baltimore, Maryland, surety, and The Prudential Insurance Company of America, a New Jersey corporation, obligee.
44. Copy of petition for writ of error to the Supreme Court of the Territory of Hawaii, dated June 30, 1925, and noted at the end thereof is the order granting the petition and allowing writ and fixing bond in the sum of \$500.00.
45. Acknowledgment of service, dated June 30, 1925.

46. Copy of amended praecipe for transcript of record, dated July 10, 1925.

You will also annex to and transmit with the record the original writ of error from the United States Circuit Court of Appeals for the Ninth Circuit, the original assignment of errors, and original citation with return of service, your return to the writ of error under the seal of the Supreme [217] Court of the Territory of Hawaii, and also your certificate stating in detail the cost of the record and by whom the same was paid.

Dated at Honolulu, T. H., July 10, 1925.

THOMPSON, CATHCART & BEEBE,

Attorneys for Plaintiff in Error.

By F. E. THOMPSON.

By M. K. A. [218]

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In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Writ of Error. Filed June 30, 1925, at 2:50 P. M., and issued for service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [219]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to  
the Honorable Justice of the Supreme Court  
of the Territory of Hawaii, GREETING:

Because in the record and in the proceedings, as also in the rendition of judgment in said Supreme Court of the Territory of Hawaii before you, in the case of Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant, manifest errors have happened to the great prejudice and damage of said Chun Ngit Ngan, petitioner and plaintiff, as is said and appears by the petition herein,

We, being willing that errors, if any have been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command [220] you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, and filed in the Circuit Court of Appeals for the Ninth Circuit, thirty days after the date hereof to the end that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein, to



correct those errors what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 30 day of June, 1925.

Attest my hand and the seal of the Supreme Court of the Territory of Hawaii, at the clerk's office, Honolulu, Territory of Hawaii, on the day and year last above written.

[Seal]

J. A. THOMPSON,

Clerk of the Supreme Court of the Territory of Hawaii.

Allowed this 30th day of June, 1925.

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii. [221]

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In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Assignment of Errors. Filed June 30, 1925, at 2:50 P. M. and issued for service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [222]

[Title of Court and Cause.]

### ASSIGNMENT OF ERRORS.

Now comes Chun Ngit Ngan, herein named as plaintiff in error, and respectfully represents that there are manifest errors in the record in the above-entitled cause, in the Supreme Court of the Territory of Hawaii, in this, to wit:

1. That the Court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, dated March 31, 1925;

2. That the Court erred in making and entering its judgment of the 12th day of May, 1925, affirming the judgment of the Circuit Court of date March 31, 1925;

3. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the insurance company had instituted a contest of policy within one year from the date of the policy;

4. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the defense of fraud was available in the above-entitled cause;

5. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the ordinary, every day meaning of the word incontestable leads to the conclusion that [223] the insurance company had contested the policy within a year after the date of the policy;

6. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there

was not any difficulty in ascertaining what the ordinary meaning of "incontestable" is;

7. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there was absolutely nothing in the policy to show that the word "incontestable" or its inferential antonym "contestable" was not used in its ordinary acceptation or was used only in its narrower meaning as an attack in court;

8. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there is no provision in the policy to the effect that the "contest" which is permitted within the first year shall be by judicial proceedings only;

9. That the Court erred, in its opinion and decision of December 11, 1924, in construing the words "incontestable" and "contestable" according to the meaning which it held was intended by the lawyers for the insurance company instead of construing such words most strongly against the party providing the policy;

10. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the origin and purpose of the clause of incontestability in policies are not open to doubt;

11. That the Court erred, in its opinion and decision of December 11, 1924, in holding that as the word "incontestable" is undoubtedly used in the policy as meaning indisputable in any way whatsoever, i. e., in court or out of court, so also the inferential antonym "contestable" means disputable

by any or every method which constitutes a dispute or attack, i. e., in court or out of court; [224]

12. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the clause of incontestability relates to what may not be done after the prescribed period and does not attempt to prescribe what may be done within that period, and that, therefore, as to the latter, the rights of the insurer are as broad as they would have been if a clause of incontestability were not in the policy, and that therefore, without that clause those rights for the first year would have included the right to dispute or attack out of court as well as in court;

13. That the Court erred, in its opinion and decision of December 11, 1924, in holding that there is nothing in the requirement that after one year the policy shall not be contestable which prescribes or indicates how it may be contested within the year;

14. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the policy is contestable other than judicially during the first year;

15. That the Court erred, in its opinion and decision of December 11, 1924, in repudiating what it recognized as an overwhelming weight of authority;

16. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the policy does not specify a contest in law and does not specify any particular mode of contest whatever;

17. That the Court erred, in its opinion and decision of December 11, 1924, in holding that the rule that the language of a policy, because it was chosen by the insurer is in case of ambiguity to be taken most strongly against the insurer was not applicable in this case, because there is a statute of this Territory requiring the inclusion in all policies of life [225] insurance of a clause providing for incontestability after the lapse of two years from the insurance; and in holding that the language of the policy under these circumstances is deemed not to be that of the insurance company;

18. That the Court erred, in its opinion and decision of December 11, 1924, in setting aside the judgment of the Circuit Court of the First Judicial Circuit of date May 12, 1924;

19. That the Court erred, in its decision of December 11, 1924, in granting a new trial;

20. That the Court erred, in its opinion and decision of January 8, 1925, in refusing a rehearing of the cause;

21. That the Court erred, in its opinion and decision of January 8, 1925, in holding that the decision of the Court of December 11, 1924, that any ambiguity in the policy was not to be construed against the insurance company was not material to the decision;

22. That the Court erred, in its decision of January 8, 1925, in holding that a rehearing or reconsideration of the point whether any ambiguity should be construed against the insurer could not possibly affect the conclusion of the Court that the



judgment of the Circuit Court of May 12, 1924, must be reversed;

23. That the Court erred, in its decision of May 12, 1925, in affirming the judgment of the Circuit Court of March 31, 1925, upon the reasoning contained in the opinion of the Supreme Court of December 11, 1924;

24. That the Supreme Court erred in failing to reverse the judgment of the Circuit Court of the First Judicial Circuit of March 31, 1925;

25. That the Supreme Court erred in reversing the judgment of the Circuit Court of the First Judicial Circuit of May 12, 1924. [226]

WHEREFORE said Chun Ngit Ngan, plaintiff in error herein, prays that the judgment of the Supreme Court of the Territory of Hawaii be reversed and that said Court be ordered to enter a judgment vacating and setting aside the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii of date March 31, 1925, and affirming the judgment of the said Circuit Court of date May 12, 1924.

Dated at Honolulu, T. H., this 30 day of June, 1925.

CHUN NGIT NGAN,  
Plaintiff in Error.

By THOMPSON, CATHCART & BEEBE,  
Her Attorneys.

By F. E. THOMPSON. [227]

In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Company of America, a New Jersey Corporation, Defendant in Error. Citation on Writ of Error. Filed June 30, 1925, at 2:50 P. M. and Issued for Service. J. A. Thompson, Clerk. Returned June 30, 1925, at 3:28 P. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu, T. H., Attorneys for Defendant in Error. [228]

[Title of Court and Cause.]

#### CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to  
The Prudential Insurance Company of America,  
a New Jersey Corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Chun Ngit Ngan is plaintiff in error, and you are defendant in error, to show cause, if any there may be, why judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 30th day of June, 1925.

Honolulu, T. H. June 30, 1925.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory of Hawaii. [229]

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In the Supreme Court of the Territory of Hawaii. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Order Extending Time to and Including September 30, 1925, to File Record and Docket Cause. Filed July 13, 1925, 10:25 o'clock A. M. J. A. Thompson, Clerk. Thompson, Cathcart & Beebe, 2-13 Campbell Block, Honolulu, T. H., Attorneys for Plaintiff in Error. Frear, Prosser, Anderson & Marx, 507 Stangenwald Building, Honolulu T. H., Attorneys for Defendant in Error. [230]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 30, 1925, TO FILE RECORD AND DOCKET CAUSE.

Upon the application of the plaintiff in error and good cause appearing therefor, and pursuant to Section 1 of Rule 16 of the United States Circuit Court of Appeals for the Ninth Circuit,—

IT IS HEREBY ORDERED that the plaintiff in error, Chun Ngit Ngan, and the Clerk of this court, be and they are hereby allowed until and including the 30th day of September, 1925, within which time to prepare and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, the record in the above-entitled cause on assignment of errors in this court, together with said assignment of errors and all other papers required as part of said record.

Dated at Honolulu, T. H., July 13, 1925.

[Seal]

E. C. PETERS,

Chief Justice of the Supreme Court of the Territory  
of Hawaii. [231]

[Title of Court and Cause.]

CERTIFICATE OF THE CLERK OF THE SUPREME COURT OF THE TERRITORY OF HAWAII TO THE TRANSCRIPT OF RECORD UPON WRIT OF ERROR AND RETURN TO WRIT OF ERROR.

Territory of Hawaii,  
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the within writ of error, the original whereof is herewith returned, being pages 219 to 221, both inclusive, of the foregoing transcript of record, and in pursuance to the amended praecipe to me directed, a copy whereof is hereto attached, being pages 213 to 218, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, the foregoing transcript of record, being pages 1 to 175, both inclusive. AND I CERTIFY the same to be full, true and correct copies of the pleadings, record, entries, exhibits and opinions which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled “Chun Ngit Ngan, Plaintiff, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant,” and Numbered 1556.

I FURTHER CERTIFY that pages 176 to 212, both inclusive, of the foregoing transcript of record, are full, true and [232] correct copies of the



pleadings, record, entries, opinions and final judgment, which are now on file in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled "Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error," Numbered 1612.

I DO FURTHER CERTIFY that the original assignment of errors, dated and filed June 30, 1925, being pages 222 to 227, both inclusive, the original citation on writ of error, dated and filed June 30, 1925, being pages 228 to 229, both inclusive, and the original order granting Chun Ngit Ngan, plaintiff in error and the Clerk of the Supreme Court of the Territory of Hawaii an extension of time until and including September 30, 1925, within which time to prepare and transmit to the United States Circuit Court of Appeals for the Ninth Circuit, the record on writ of error, dated and filed July 13, 1925, being pages 230 to 231, both inclusive, of the foregoing transcript of record are herewith returned.

I LASTLY CERTIFY that the cost of the foregoing transcript of record is \$155.90, and the said amount has been paid by Messrs. Thompson, Cathcart & Beebe, the attorneys for Chun Ngit Ngan, plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and

County of Honolulu, this 3d day of August, A. D. 1925.

[Seal]

JAMES A. THOMPSON,

Clerk of the Supreme Court of the Territory of  
Hawaii. [233]

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[Endorsed]: No. 4660. United States Circuit Court of Appeals for the Ninth Circuit. Chun Ngit Ngan, Plaintiff in Error, vs. The Prudential Insurance Company of America, a New Jersey Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Supreme Court of the Territory of Hawaii.

Filed August 12, 1925.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

